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ABSTRACT

Following introductory sections concerning the history of collective bargaining and the distinctions between the public and private sectors that affect labor relations, this document presents approaches that managers in the public sector can take when dealing with employees. The author notes the government's responsibility in the growth of unionization and describes the concepts and purposes of unionization in the private and public sectors. Arguing that government's statutory responsibility to provide services and its monopolistic control of those services give unions unfair advantages and deny the public its rightful control over government activities, the author proposes methods for resisting unionization. The document next discusses the handling of employee complaints and describes managers' rights to unionize and to bargain collectively. Two chapters of the document cover crucial steps for public agencies to take before and after beginning negotiations. A final chapter discusses administration of the contract. (PGD)

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SCHOOL AND GOVERNMENT LABOR RELATIONS

A GUIDE FOR LIVING WITH

AND WITHOUT UNIONS

By

Richard G. Neal

# A GUIDEBOOK FOR SCHOOL AND GOVERNMENT MANAGERS

EA 015 136

This book is dedicated to Michael, Linda, Susanna, and Melanie, who worked together as a family while their father was far from home learning the concepts discussed in this book.

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## ABOUT THE AUTHOR

Richard G. Neal is a specialist in government personnel administration and every aspect of public sector labor relations. During the past twenty years, Mr. Neal has lectured to thousands of management personnel throughout the United States and Canada. He is author of numerous books on all aspects of school and government labor relations, as well as editor of several professional journals and author of many articles. Mr. Neal has represented both management and labor, experiences which have given him unique insight into labor relations.

## OTHER PUBLICATIONS BY THE AUTHOR

| | |
|---|---|
| 1968 | The Control of Teacher Militancy |
| 1969 | Resolving Negotiations Impasses |
| 1970 | Laws Affecting Public School Negotiations |
| 1971 | Grievance Procedures and Grievance Arbitration |
| 1971 | Readings in Public School Collective Bargaining (Editor) |
| 1972 | Avoiding and Controlling Teacher Strikes |
| 1973 | Municipal Progress (Editor and Contributor) |
| 1974 | Collective Bargaining in Virginia's Public Schools |
| 1976 | Negotiations in the Mid-Seventies (Editor and Contributor) |
| 1977 | Negotiations Games People Play (Editor and Contributor) |
| 1969-1978 | Educators Negotiating Service, 10 volumes (Editor) |
| 1968-1978 | Negotiations Management, 11 volumes (Editor) |
| 1980 | Bargaining Tactics: A Reference Manual for Public Sector Labor Relations |
| 1981 | Retrieval Bargaining |
| 1981 | Negotiations Strategies |
| 1982 | School and Government Labor Relations |
| 1983 | Countering Strikes and Militancy in School and Government Services |
| 1983 | Managing Time: An Administrator's Guide |
| 1983 | Bargaining Tactics, Volume 2 |

This book is not intended to provide legal advice on any matter contained herein and should not be used for such a purpose. Where legal advice is needed on any matter contained in this book, proper legal advice should be sought.

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## INTRODUCTION

During the opening years of the 1980s, forty states and the federal government had laws which permitted collective bargaining between public employees and their public employers. Thousands of public school districts and other governmental jurisdictions were involved in the labor negotiations process; whereas less than two decades ago, there was almost no collective bargaining in the public sector. All of this did not come about without a price. Partly due to massive unionization of public employees, government is less responsive to the needs of the public, costs in government services have escalated faster than any other segment of the economy, public employees, their employers and the public have been polarized, efficiency in government has generally declined, and government has become less democratic, due to the exclusive rights of private unions to negotiate with public bodies.

How did all this come about? There are many complex reasons, some of which are:

1. Rampant Growth of Government

At the end of World War II about one out of each twelve workers was on a public payroll. By 1980 that figure had increased to an alarming one out of five workers. During that same period the costs of government increased at a rate faster than inflation and the government sector was the fastest growing segment of our economy. As the number of public employees grew and as astronomical funds were

transferred to government service, it was only natural that public employee organizers would soon discover the great potential for unionizing public employees.

2. Private sector collective bargaining

During the period of frightening government growth, collective bargaining in the private sector reached its peak. Strikes and settlements became daily news items in the press and on television. The nation came to accept that collective bargaining was the normal way and the right way to conduct business. All during that period, public employees viewed the "gains" of industrial laborers with envy. Rapidly the popular attitude arose that public employees were "second class citizens" because they did not have bargaining rights. Consequently, a vast lobby network developed to exert political pressure on the politicians to grant collective bargaining rights to public employees. The first breakthrough in this lobby effort was the approval of Executive Order 10988 by President Kennedy. Immediately thereafter one state after another enacted bargaining laws for their local and state public employees.

3. Perceived lower pay

There has always been a popular myth that public employees are treated less well than private employees. Despite a number of studies that indicate public employees are as well off or better off than private employees (when all relevant factors are considered, e.g., job tenure), the general belief of "second class" citizenship continued. Because of this perception, there was more support for collective bargaining than would have been the case otherwise.

4. **Union pressure**

As the public employment force was growing, union membership in the private sector was falling. Given this situation it was no wonder that some labor unions saw the public sector as an opportunity to obtain additional dues-paying members. Consequently, a number of unions that had been historically associated with industry, now turned their attention to public employees, and with some success increased their memberships.

5. **Reapportionments**

In 1962 and 1964 the U.S. Supreme Court handed down two decisions which dealt with the "one man, one vote" concept. As a result, beginning with Michigan, state after state was required to reapportion their legislatures. As a result, the political balance swung more to the population centers which are generally controlled by Democrats, the "workers" party. Consequently, support shifted during the sixties to legislation more favorable to labor, making collective bargaining laws for public employees more likely.

6. **Legal decisions**

Beginning in the 1950s a number of state and federal court decisions were handed down which made it increasingly clear that public employees had the right to join labor unions and that collective bargaining was not prohibited by the Constitution. Once the legal framework for bargaining was established, the union movement had one more obstacle removed from its path.

7. **Executive Order 10988**

In 1962, President Kennedy signed his famous Executive Order 10988, which gave collective bargaining rights to federal employees. Beginning with that act and within fifteen years, most of the states had enacted collective bargaining laws for state and local public employees.

8. **The weakening of local government**

There is no doubt that the power of self-government has shifted relentlessly over the decades from the local community to the state and federal governments. As a result, local municipalities and school districts increasingly lost their powers and became less able and less willing to resist the pressures of unions to be recognized.

9. **Governmentized private enterprise**

As government grew alarmingly for three decades after World War II, increasingly, government took on the enterprises which normally would have been handled by the private sector. City after city, governmentized transportation, power, trash collection, ports and docks, and welfare. As government took on more such enterprises, it also took into its fold employees who believed in the industrial model for labor relations. The more government involved itself in matters of private enterprise, the less able it was to resist the granting of bargaining rights to the employees of these socialized private enterprises.

10. **Inflation**

Government created inflation and then the employees of the same government that created inflation demanded to have collective bargaining rights in order to keep up with inflation, which added to inflation. As

inflation continues to do its insidious harm to all workers, many public employees seem to believe that the only answer is to demand more. Not only is giving more to public employees not the answer to inflation, it contributes to inflation. But no matter, union leaders have never been leaders in understanding what makes a vibrant and profitable economy.

## 11. Misunderstanding

The author is convinced that collective bargaining in the public sector (as now construed) is a colossal misunderstanding of the nature of public service and differences between the private and public sectors. An expanded discussion of this theory is discussed in this book.

## I. GOVERNMENT GROWTH FOUNDATION FOR UNIONS

### A. Government Pay Grew 149% Last Decade

According to the Tax Foundation,[1] paychecks for the nation's state and local government workers have shot up 149 percent in ten years, despite a much more modest 30 percent increase in the number of workers employed. In October 1980, the monthly state-local payroll totaled $14.7 billion, compared with $5.9 billion a decade earlier and $2.2 billion 20 years ago.

For the same ten-year period, 1970-1980, the gross national product (GNP) grew at 165 percent, the Tax Index climbed 174 percent, and inflation chalked up a 94 percent increase.

In the fall of 1980, 11 million full-time equivalent employees received paychecks from states or localities, whereas 8.5 million held public jobs at those levels in October 1970 and 5.6 million in 1960. The ratio of public employees to the public they serve has registered a 16 percent increase over the decade, from 420 per 10,000 of population in 1970 to 488 per 10,000 ten years later.

California employed the most public sector workers, 1.1 million in 1980, followed by New York, with 946,000. Ten years earlier, their relative positions were reversed. New York had 935,000 state-local

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[1] Monthly Tax Features, Tax Foundation, Inc., vol. 25, no. 8, September 1981.

workers then, compared with 892,000 in the Golden Gate State. Vermont employed the fewest public workers in October 1980 (25,000), while Alaska held that distinction a decade earlier, with 16,000.

State and local government employment rose by 0.9 percent in 1980, compared to a 1.1 percent increase in U.S. population. This represents a continuation in the slowing of state-local employment growth of the late 1970s, but it marks the first time in postwar history that state-local employment increases have fallen behind U.S. population.

In comparison, state-local public employment averaged 2.6 percent annual growth during the 1970s and 4.4 percent during the 1960s. The charts following demonstrate these statistics in tabular form.

STATE AND LOCAL GOVERNMENT EMPLOYMENT AND PAYROLLS[2]
Month of October 1970 and 1980

| State | Employees[a] Number (000) 1970 | Employees[a] Number (000) 1980 | Employees[a] Percent Increase | October Payroll Amount (millions) 1970 | October Payroll Amount (millions) 1980 | October Payroll Percent Increase | Employees[a] per 10,000 Population Number 1970 | Employees[a] per 10,000 Population Number 1980 | Employees[a] per 10,000 Population Percent Increase |
|---|---|---|---|---|---|---|---|---|---|
| TOTAL | 8,528 | 11,047 | 30 | $5,906 | $14,730 | 149 | 420 | 488 | 16 |
| Alabama | 136 | 196 | 44 | 70 | 214 | 206 | 394 | 504 | 28 |
| Alaska | 16 | 32 | 100 | 16 | 69 | 331 | 515 | 803 | 56 |
| Arizona | 77 | 137 | 78 | 56 | 198 | 254 | 435 | 506 | 16 |
| Arkansas | 73 | 106 | 45 | 34 | 105 | 209 | 380 | 465 | 22 |
| California | 892 | 1,108 | 24 | 784 | 1,864 | 138 | 447 | 468 | 5 |
| Colorado | 107 | 149 | 39 | 69 | 206 | 199 | 484 | 515 | 6 |
| Connecticut | 113 | 138 | 22 | 87 | 193 | 122 | 371 | 445 | 20 |
| Delaware | 26 | 31 | 19 | 17 | 39 | 129 | 472 | 526 | 11 |
| Florida | 295 | 459 | 56 | 186 | 546 | 195 | 434 | 471 | 9 |
| Georgia | 198 | 308 | 56 | 105 | 321 | 206 | 432 | 563 | 30 |
| Hawaii | 38 | 49 | 29 | 30 | 68 | 127 | 496 | 503 | 1 |
| Idaho | 32 | 45 | 41 | 17 | 54 | 218 | 455 | 481 | 6 |
| Illinois | 440 | 509 | 16 | 336 | 745 | 122 | 396 | 446 | 13 |
| Indiana | 199 | 248 | 25 | 125 | 295 | 136 | 383 | 451 | 18 |
| Iowa | 122 | 148 | 21 | 76 | 188 | 147 | 432 | 508 | 18 |
| Kansas | 106 | 127 | 20 | 61 | 146 | 139 | 470 | 536 | 14 |
| Kentucky | 115 | 155 | 35 | 65 | 177 | 172 | 356 | 423 | 19 |
| Louisiana | 160 | 224 | 40 | 88 | 240 | 173 | 438 | 532 | 21 |
| Maine | 41 | 51 | 24 | 22 | 59 | 168 | 412 | 458 | 11 |
| Maryland | 161 | 231 | 43 | 117 | 319 | 173 | 411 | 547 | 33 |
| Massachusetts | 228 | 287 | 26 | 162 | 395 | 144 | 401 | 500 | 25 |
| Michigan | 359 | 435 | 21 | 291 | 695 | 139 | 404 | 470 | 16 |
| Minnesota | 162 | 203 | 25 | 120 | 292 | 143 | 425 | 498 | 17 |
| Mississippi | 94 | 130 | 37 | 42 | 122 | 190 | 422 | 514 | 22 |
| Missouri | 184 | 229 | 24 | 111 | 261 | 135 | 392 | 465 | 19 |
| Montana | 33 | 44 | 33 | 20 | 54 | 170 | 479 | 556 | 16 |
| Nebraska | 74 | 93 | 26 | 43 | 109 | 153 | 498 | 590 | 18 |
| Nevada | 25 | 40 | 60 | 19 | 57 | 200 | 519 | 501 | -3 |
| New Hampshire | 27 | 41 | 52 | 17 | 47 | 176 | 361 | 450 | 25 |

State and Local Government Employment and Payrolls--Continued

| State | Employees[a] Number (000) 1970 | Employees[a] Number (000) 1980 | Employees[a] Percent Increase | October Payroll Amount (millions) 1970 | October Payroll Amount (millions) 1980 | October Payroll Percent Increase | Employees[a] Per 10,000 Population Number 1970 | Employees[a] Per 10,000 Population Number 1980 | Employees[a] Per 10,000 Population Percent Increase |
|---|---|---|---|---|---|---|---|---|---|
| New Jersey | 268 | 370 | 38 | 200 | 518 | 159 | 374 | 502 | 34 |
| New Mexico | 49 | 77 | 57 | 29 | 91 | 214 | 486 | 590 | 21 |
| New York | 935 | 946 | 1 | 754 | 1,393 | 85 | 514 | 539 | 5 |
| North Carolina | 189 | 298 | 58 | 112 | 342 | 205 | 372 | 508 | 37 |
| North Dakota | 28 | 33 | 18 | 17 | 43 | 153 | 450 | 503 | 11 |
| Ohio | 390 | 473 | 21 | 256 | 614 | 140 | 366 | 438 | 20 |
| Oklahoma | 107 | 158 | 48 | 59 | 171 | 190 | 420 | 524 | 25 |
| Oregon | 97 | 135 | 39 | 67 | 189 | 182 | 463 | 514 | 11 |
| Pennsylvania | 414 | 475 | 15 | 282 | 635 | 125 | 351 | 401 | 14 |
| Rhode Island | 36 | 45 | 25 | 25 | 62 | 148 | 379 | 471 | 24 |
| South Carolina | 103 | 161 | 56 | 53 | 172 | 225 | 396 | 516 | 30 |
| South Dakota | 32 | 34 | 6 | 18 | 37 | 106 | 483 | 500 | 4 |
| Tennessee | 162 | 225 | 39 | 85 | 248 | 192 | 414 | 490 | 18 |
| Texas | 454 | 695 | 53 | 265 | 826 | 212 | 405 | 488 | 20 |
| Utah | 48 | 68 | 42 | 30 | 88 | 193 | 449 | 463 | 3 |
| Vermont | 19 | 25 | 32 | 12 | 28 | 133 | 424 | 482 | 14 |
| Virginia | 184 | 269 | 46 | 115 | 321 | 179 | 396 | 503 | 27 |
| Washington | 160 | 204 | 28 | 120 | 314 | 162 | 468 | 495 | 6 |
| West Virginia | 72 | 100 | 39 | 39 | 108 | 177 | 412 | 511 | 24 |
| Wisconsin | 183 | 226 | 23 | 135 | 325 | 141 | 414 | 480 | 16 |
| Wyoming | 20 | 30 | 50 | 12 | 40 | 233 | 603 | 644 | 7 |
| Dist. of Columbia | 49 | 49 | b | 37 | 85 | 132 | 643 | 763 | 19 |

[a]Full-time equivalent employees.

[b]Less than .5%.

[2]Source: Bureau of the Census, U.S. Department of Commerce; and Tax Foundation computations.

GOVERNMENT EMPLOYMENT AND POPULATION[3]

| Fiscal Year | Federal Executive Branch | State and Local Governments | Total U.S. Population |
|---|---|---|---|
| | (in thousands) | | |
| 1947 | 2,082 | 3,568 | 144,698 |
| 1948 | 2,044 | 3,776 | 147,208 |
| 1949 | 2,075 | 3,906 | 149,767 |
| 1950 | 1,934 | 4,078 | 152,271 |
| 1951 | 2,456 | 4,031 | 154,878 |
| 1952 | 2,574 | 4,134 | 157,553 |
| 1953 | 2,532 | 4,282 | 160,184 |
| 1954 | 2,382 | 4,552 | 163,026 |
| 1955 | 2,371 | 4,728 | 165,931 |
| 1956 | 2,372 | 5,064 | 168,903 |
| 1957 | 2,391 | 5,380 | 171,984 |
| 1958 | 2,355 | 5,630 | 174,882 |
| 1959 | 2,355 | 5,806 | 177,830 |
| 1960 | 2,371 | 6,073 | 180,671 |
| 1961 | 2,407 | 6,295 | 183,691 |
| 1962 | 2,485 | 6,533 | 186,538 |
| 1963 | 2,490 | 6,834 | 189,242 |
| 1964 | 2,469 | 7,236 | 191,889 |
| 1965 | 2,496 | 7,683 | 194,303 |
| 1966 | 2,664 | 8,259 | 196,560 |
| 1967 | 2,877 | 8,730 | 198,712 |
| 1968 | 2,951 | 9,141 | 200,706 |
| 1969 | 2,980 | 9,496 | 202,677 |
| 1970 | 2,944 | 9,860 | 204,875 |
| 1971 | 2,883 | 10,257 | 207,045 |
| 1972 | 2,823 | 10,640 | 208,842 |
| 1973 | 2,775 | 11,065 | 210,396 |
| 1974 | 2,847 | 11,463 | 211,909 |
| 1975 | 2,848 | 12,025 | 213,450 |
| 1976 | 2,850 | 12,408 | 215,074 |
| 1977 | 2,797 | 12,601 | 216,814 |
| 1978 | 2,888 | 12,743 | |
| 1979 | 2,864 | 12,942 | |
| 1980 | 2,902 | 13,155 | |

[3]Budget of the U.S. Government 1980 and U.S. Commerce Department, Bureau of the Census.

## B. Public Employee Workforce Grows Relentlessly

In 1940, there were about 3.5 million government employees in America, a number which represented about 6.5 percent of the civilian labor force. By 1950, government employment had climbed to about 5.5 million, or about 9 percent of the civilian workforce. In 1960, the number of government employees had reached about 7.8 million, or 11 percent of the workforce. In 1970, the total number of government employees had reached a staggering 12.6 million (10 million were state and local employees and 2.6 million were federal employees), or 15 percent of the nation's employment force. By 1975, the total number of all government employees was about 15 million, or 20 percent of the total labor force. Although there were some signs of abatement as the nation exited from the 1970s, 1980 found government employment at an all-time high in the history of the nation.

Here's the big picture. In 1940, about one out of every fifteen workers was on the public payroll. At the end of World War II, about one out of every twelve workers was on the public payroll. At the opening of the 1980s, about one out of every five workers was on the public payroll. This one set of figures is probably more important than any other set of data in helping to explain the plight of the nation's economy as it entered the 1980s.

## C. Government Growth Slows

With a sharp decrease in the ranks of local government workers leading the way, the total number of government jobs in the United States declined in 1981 for the first time since the end of World War II, according to the U.S. Bureau of Labor Statistics. The number of

people on federal, state, and local government payrolls dropped by 316,000 to a total of about 16 million in the twelve-month period ending October 31, 1981, the Bureau said. Of that figure, 246,000 were in local government, 30,000 in state government, and 40,000 in federal government.

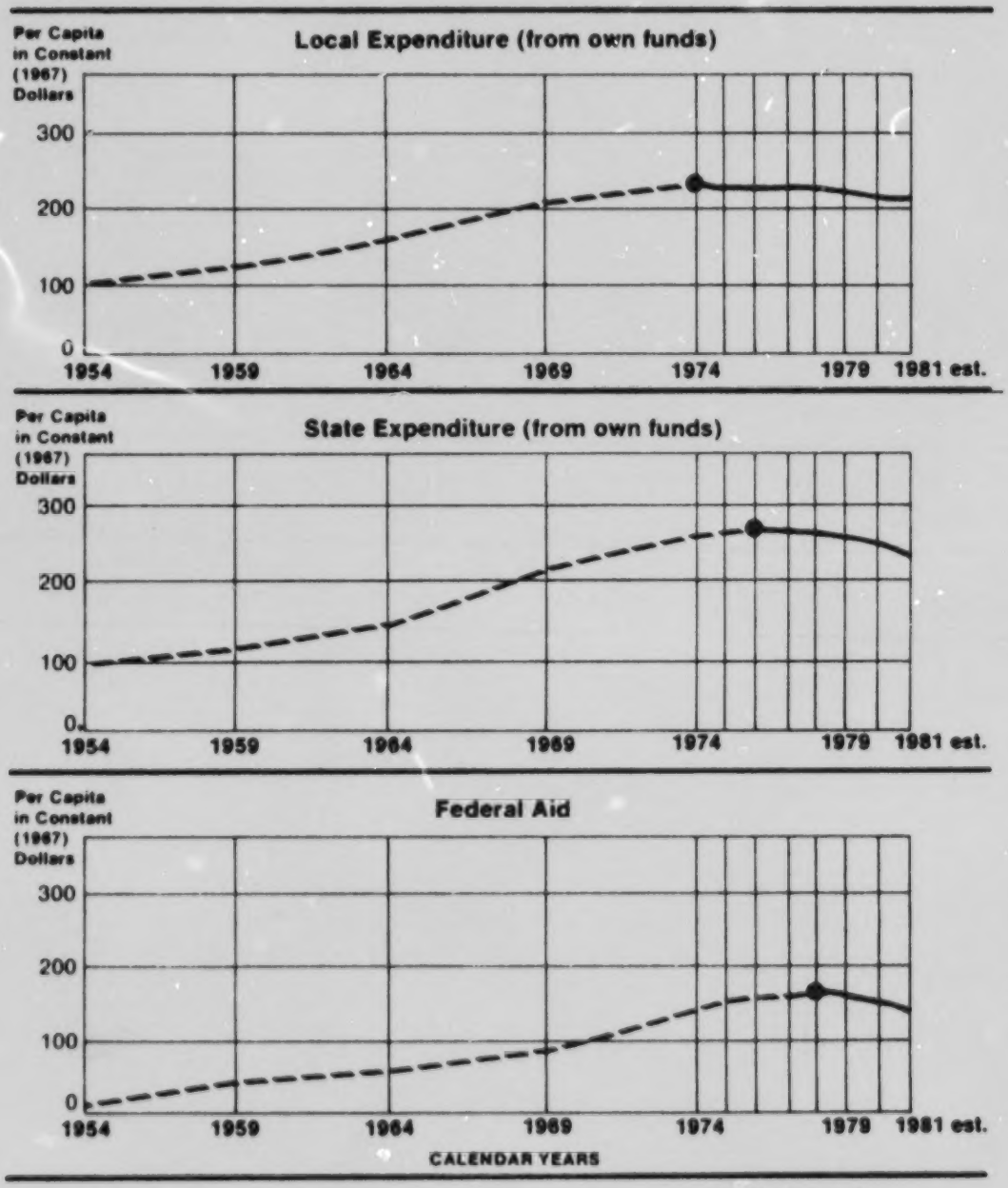
For most of this century public sector employment has risen steadily taking a large share of the total workforce, and during the Great Society era of the 1960s, government employment was the fastest growing segment of the nation's labor market. Until 1981, the only other periods of decline in government employment recorded by the Bureau were the recession of 1920-21, the Great Depression years of 1932-33, and the period between 1944 and 1947.

### D. ACIR Also Identifies Slowdown in Government

The Advisory Commission on Intergovernmental Relations (ACIR) released a report at the end of 1981 in its Significant Features of Fiscal Federalism which details a slowdown in the growth of government. According to the ACIR between 1942 and 1976 the state and local public sector was a high growth industry. Since 1976, however, state-local government has become static, if not declining during 1981. In contrast to the earlier thirty-four-year period when state-local spending grew almost three times as fast as the economy, the rate of increased government spending slowed significantly.

The following illustration depicts the decline in "real" state-local spending.

**The Decline In "Real" State-Local Spending (4)**
**(Decline in Local Spending Commencing 1975, State Spending 1977, Federal Aid Flows 1979)**




[4] Public Administration Times, January 15, 1982, a publication of the American Society for Public Administration.

## E. Union Decline Follows

Public sector unions seem to have reached their peak membership in 1974, when 51.1 percent of the full-time state and local government workforce belonged to a union, according to the U.S. Census Bureau. However, in 1975, the percentage had dropped to 49.9 percent, and by 1979 the percentage was down to 47.9 percent. In the private sector the percentage of unionized workers peaked in 1953 at 25.5 percent, but by 1978 the percentage had dropped to 16.2 percent. It would appear that union popularity wears off after a period of time.

Beginning in 1962 with the signing of President Kennedy's Executive Order 10988, which granted collective bargaining to federal employees, some forty states adopted collective bargaining laws, all by 1975 when California adopted its law, but no other states have adopted a bargaining law since then, except for one in 1978--Tennessee. The following chart is based upon U.S. Census Bureau[5] information indicating full-time employees belonging to employee unions or associations.

| Year | Organized Local Emp. | Organized State Emp. | Total |
|---|---|---|---|
| 1972 | 3,351,227<br>53.5% | 941,774<br>40.7% | 4,293,001<br>50.0% |
| 1974 | 3,755,390<br>56.0% | 969,741<br>39.3% | 4,725,131<br>51.5% |
| 1975 | 3,697,267<br>53.9% | 1,004,961<br>39.6% | 4,702,228<br>49.9% |
| 1976 | 3,745,328<br>54.1% | 991,634<br>38.2% | 4,736,962<br>49.8% |
| 1977 | 3,701,083<br>51.6% | 1,008,548<br>37.7% | 4,709,631<br>47.8% |

[5]Annual Report of the U.S. Bureau of the Census, 1980.

| Year | Organized Local Emp. | Organized State Emp. | Total |
|---|---|---|---|
| 1978 | 3,744,762<br>51.9% | 1,043,481<br>38.1% | 4,788,243<br>48.1% |
| 1979 | 3,783,317<br>51.4% | 1,097,929<br>38.7% | 4,881,246<br>47.9% |

## II. A BRIEF HISTORY OF COLLECTIVE BARGAINING

The collective bargaining picture in the public sector in the 1980s is far different from that of 1920, when a Calvin Coolidge could be elected after breaking a police strike; it is far different from the world of 1937, when President Franklin Delano Roosevelt declared that "government employees should recognize that the process of collective bargaining . . . cannot be transplanted into the public service."

It has been transplanted, as abundantly evidenced by federal, state, and local collective bargaining laws and hundreds of strikes by public employees at all levels of government.

It is only natural that union officials should turn their attention to public employee unionism, which holds the most lucrative potential of all. There are roughly 16,000,000 government employees in this country, and government today employs about 18 percent of the workforce in the entire country. In 1965, it was predicted that "By 1975, state and local government employment is expected to increase by nearly two-thirds, and account for more than 80% of all government employment."[1] There is potentially a vast reservoir of new dues-paying members for unions in the public sector, which have been faced with a decline in membership, as a percentage of the workforce, in the private sector.

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[1]Bernard Yabroff, "Trends and Outlook for Employment in Government," 88 Monthly Labor Review 285 (1965).

## A. The Private Sector Roots

The history of collective bargaining in the private sector of our economy may foretell developments in collective bargaining in the public sector.

The origin of our present labor unions can be traced to the medieval guilds. In this country there has been some type of labor unionization ever since the nation's birth. This is true even in public employment. As the 1961 Report of the President's Task Force on Employee-Management Relations in the Federal Service noted, "Organizations of craftsmen have been active in naval installations since the early 1800's."[2]

It has been an uphill battle for organized labor, however. At the beginning of the nineteenth century it was a criminal act to conspire to raise wages. By the middle of that century, such actions were no longer considered criminal acts and unions began to grow rapidly.

In 1890, the Sherman Anti-Trust Act was passed by Congress in an attempt to restrict the harmful effects of trusts and similar business combinations. But the federal courts interpreted the law to cover unions also.[3] As a result, a host of rulings found unions guilty of restraint of trade, resulting in injunctions, imprisonment and fines. Then in 1914, the Clayton Act was passed. It was designed to exclude labor unions from the anti-trust law, but the courts continued to view unions as forms of trusts. It was not until the early 1940s that a

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[2]Report of the President's Task Force on Employee-Management Relations in the Federal Service (Washington, D.C.: Government Printing Office, 1961), p. 2.

[3]Loewe v. Lawlor, 208 U.S. 274 (1908).

series of Supreme Court decisions exempted unions from anti-trust suits.

Historically, labor and capital, the two most important factors in production, have often been engaged in violent conflict. Although such conflicts appear to have been necessary, there have been attempts over the years to minimize them. Labor has taken the position that unless workers were organized, the capitalistic forces of management would abuse and take advantage of them.

Unions have taken various forms over the years. There have been (and are today) both trade unions based on craft or skill, and industrial unions encompassing many trades, crafts, and skills in one industrial field. These unions have tried to improve the welfare of workers through reducing hours of work, raising wages, improving working conditions and acquiring fringe benefits. They have been primarily concerned with the welfare of the workers, and not with the management of industry. This fact is very significant when we observe the development of the concept of collective negotiations among public employees, especially teachers and other professionals who wish to negotiate not only working conditions, but matters of management.

As Morris Slavney, Chairman of the Wisconsin Employment Relations Commission, noted, "The duty to bargain should be limited to matters affecting wages, hours and conditions of employment."[4]

Labor unions have sought to improve their own organizational welfare through the closed shop, maintenance of membership, restriction of output, the union shop, the agency shop, limitation of apprentices, the

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[4]Morris Slavney, Testimony before the House Committee on Education and Labor, Special Subcommittee on Labor on H.R. 7684, H.R. 9324, and H.R. 12532, May 2, 1972.

union label, strikes, boycotts, and other forms of work stoppages and political activities. Management has responded to such threats by using strike breakers, forming company unions, acquiring injunctions, circulating black lists, employing lockouts, and consummating yellow-dog and sweetheart contracts.

Many procedures have been employed to prevent and settle industrial conflicts. Among such procedures are mediation and conciliation, voluntary arbitration, compulsory arbitration, advisory arbitration, fact-finding, employee representation, profit sharing, and human relations councils.

Because such procedures have not always created harmonious relations between labor and management, various states and the United States Congress have found it necessary to enact certain laws. Among these have been the Norris-LaGuardia Act, the National Industrial Recovery Act, the National Labor Relations Act (the Wagner Act), the Labor Management Relations Act (the Taft-Hartley Act) and the Landrum-Griffin Act. The most significant of these laws, of course, was the Wagner Act of 1935 which established national labor policy.

However, none of the laws cited established procedures for collective bargaining in the public sector, although precedents and experiences from them are now being transferred extensively to the public sector. The wisdom of doing so, however, was questioned ten years ago by Walter C. Kane, City Administrator for Lakewood, Colorado: "To simply transfer an arrangement developed during the 1930's to local government labor relations is to ignore . . . the basically unique set of relations in each city and each state, and to greatly hamstring city management in

the process."[5] Likewise, the Advisory Commission on Intergovernmental Relations in its 1969 Report on Labor-Management Policies for State and Local Government notes on page 112 of that report that it "opposes any Federal effort to mandate a collective bargaining, meet and confer, or any other labor-relations system for the employees of state and local jurisdictions or for any sector thereof."[6] The National League of Cities endorsed the ACIR approach.

## B. Civil Service Concept

The development of the civil service paralleled the growth of industrial labor unions. The spoils system had long been under fire and the first step of the reform process began in 1883 with the passage of the Pendleton Act. Federal legislation was later amended to broaden the areas of civil service in government; many states developed merit systems, but the patronage system never really disappeared.

The rationale of civil service is based on the need for competent employees in government as well as the need to protect them from discharge by politicians intent on distributing favors. To achieve such goals the civil service system had to free itself from political pressure and concentrate on the recruitment, examination, promotion, classification and wage and salary schedules, and discipline.

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[5]Walter Kane, Testimony before the House Committee on Education and Labor, Special Subcommittee on Labor on H.R. 7684, H.R. 9324, and H.R. 12532, April 13, 1972.

[6]Report on "Labor-Management Policies for States and Local Government," Advisory Commission on Intergovernmental Relations (Washington, D.C.: Government Printing Office, September 1969).

On the whole the civil service merit system worked well; however, many public employees found civil service less than satisfactory. They came to feel that only by organizing would they achieve wage and fringe benefits comparable to those in industry. Increasingly, organized public employees regarded the Civil Service Commission as an arm of management, rather than an impartial third party to protect employees.

It is clear that the civil service merit concept and mandated collective bargaining for public employees as envisioned under federal law proposed in 1972, are mutually exclusive. James F. Marshall, President of the Assembly of Governmental Employees, in 1972, said "It is the belief of AGE that the legislation pending before this subcommittee does not promote or encourage the merit system concept but would, in fact, be the most devastating blow to the merit system ever proposed."[7] Jean J. Couturier, Executive Director of the National Civil Service League, in 1971, stated: "Civil service systems will undergo great change under collective bargaining. The merit principles and the civil service systems as we know them are going to be nonexistent."[8]

### C. Public Sector Before WW II

Prior to World War II, there were no public sector collective bargaining statutory records to speak of. The right of public employees

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[7]James F. Marshall, Testimony before the House Committee on Education and Labor, Special Subcommittee on Labor on H.R. 7684, H.R. 9324, and H.R. 12532, April 12, 1972.

[8]Jean J. Couturier, "Proceedings of the Secretary of Labor's Conference on State and Local Government Labor Relations, November 21-23, 1971," U.S. Department of Labor, Labor Management Services Administration, February 1972.

to form or belong to unions or associations was often recognized, but public authorities were under no obligation to enter into negotiations with them or to reach agreements. The strike was universally forbidden under court decisions and executive declarations. A few formal collective bargaining arrangements existed, such as that with the Tennessee Valley Authority, and informal arrangements were found in communities throughout the country, but they applied to only a small minority of public employees. In fact, the dominant union in the public sector today, the American Federation of State, County and Municipal Employees (AFL-CIO), only had 9,737 members in 1936.[9]

## D. The Public Sector Roots

In 1917, the Chicago Board of Education adopted a resolution which prohibited Chicago teachers from belonging to the Chicago Federation of Teachers, but several teachers did join the CFT, and they were fired. The teachers appealed to the courts and the Illinois Supreme Court upheld the School Board's action, stating that union membership "is inimical to proper discipline, prejudicial to the efficiency of the teaching force, and detrimental to the welfare of the public school system."[10]

A similar case arose in Seattle in 1930, with the courts making the same decision.[11]

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[9]W. D. Heisel and J. D. Halligan, "Questions and Answers on Public Employee Negotiation" (Chicago: Public Personnel Association, 1967), p. 10.

[10]People ex rel. Fursman v. City of Chicago, 116 N.E. 158, 1917.

[11]Seattle High School Chapter No. 200 of the A.F.T. v. Sharples, 293, Pac 994, 1930.

This general prohibition against public school teachers belonging to a labor union was not reversed until 1951 when some teachers employed by the Norwalk (Connecticut) School Board were fired for going on strike. Although the state's Supreme Court upheld their dismissal,[12] the Court also ruled that in the absence of enabling legislation:

a. Public school teachers may organize.

b. A school board is permitted, but is not legally required to negotiate with a teachers' union.

c. A school board may agree to arbitrate a labor dispute with teachers, if the school board makes the final decision.

d. A school board may not agree to a closed shop.

e. Public school teachers may not strike.

In 1932, the Tennessee Valley Authority was incorporated as an autonomous government corporation, and beginning in 1935 it conducted a labor relations program which led to negotiated labor contracts covering pay classifications, selection of personnel, work schedules, etc., with craft union and professional associations of employees. Some experts viewed the TVA labor relations program so successful that some attempted to use it as a model for other public sector bargaining laws.

Due to a rash of industrial strikes during 1933 and 1934, Senator Wagner was convinced that the nation needed a comprehensive labor law. Consequently, Public Resolution No. 44 was passed, and on June 19, 1934, President Roosevelt signed it. Since a presidential executive order was required to put the resolution into effect, President Roosevelt signed

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[12] Norwalk Teachers' Association v. Board of Education, 83A.2d 482, 1951.

such an order and created the National Labor Relations Board on June 29, 1934. Then on February 21, 1935, Senator Wagner introduced the National Labor Relations Act. Congress passed the Act on July 5, 1935 and the President signed it into law.

Soon after the emergence of the National Labor Relations Act, a number of court decisions and attorney general opinions were handed down which made union membership and strikes by public employees illegal. For example, a Florida attorney general stated in 1944:

> . . . no organization, regardless of who is affiliated with, union or non-union, can tell a political sub-division possessing the attributes of sovereignty, who it can employ, how much it shall pay them, or any other matter or thing relating to its employees. To even countenance such a proposition would be to surrender a portion of the sovereignty that is possessed by every municipal corporation and such a municipality would cease to exist as an organization controlled by its citizens, for after all, government is no more than the individuals that go to make up the same and no one can tell the people how to say, through their duly constituted and elected officials, how the government should be run under such authority and powers as the people themselves give to a public corporation such as a city.[13]

And in 1946, a court decision read:

> There is an abundance of authority, too numerous for citation, which condemns labor union contracts in the public service. The theory of these decisions is that the giving of a preference [to unions and their members] is against public policy. It is declared that such preference, in whatever form, involve an illegal delegation of disciplinary authority, or of legislative power, or of the discretion of public officers; that such a contract disables them from performing their duty; that it involves a divided allegiance; that it encourages monopoly; that it defeats competition; that it is detrimental to the public welfare; that it is subversive of the public service; and that it impairs the freedom of the individual to contract for his own services. . . .[14]

[13]Florida Attorney General's Opinion, March 21, 1944, reproduced in Rhyne, Labor Unions and Municipal Employee Law (Washington, D.C.: National Institute of Municipal Law Offices, 1946), pp. 252-54.

[14]Mugford v. Mayor and City Council of Baltimore, opinion Nov. 6, 1944, aff'd, 185 Md. 266, 44 A.2d 745 (1946).

## E. The Issue of Sovereignty

The hesitancy to recognize union of government employees seems to have been based on the concept that sovereignty and labor unions are incompatible in that unions deprive sovereign governments of needed employee loyalty. However, from 1907 when Justice Oliver Wendell Holmes gave carte blanche support for government sovereignty by stating:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.[15]

until the present, the concept of sovereign immunity has steadily been eroded to the point that governments and individual government leaders and employees may be sued for almost any alleged wrongful act. Furthermore, the widespread presence of collective bargaining, interest arbitration, legal strikes (in some instances), and grievance arbitration is a clear indication that the concept of the "King can do no wrong" is now almost an ancient myth.

Some view the trend in eroding government sovereignty as a false issue in that the loss of immunity is nothing more than holding government accountable for its actions. Many view collective bargaining by public employees merely as the willingness of government to delegate some of its sovereignty. Furthermore, proponents of collective bargaining for public employees maintained that governments have always bargained with private agencies over the purchase of supplies and services. Why not bargain with a union over the purchase of personnel services? Also, these same proponents argued that governments at all levels had

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[15] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1970).

established long-standing practices of final and binding arbitration of disputes with nongovernment agents, such as building contractors. Why, then, should there not be final and binding arbitration of disputes with employees over contracts for their services?

## F. NLRA Never Designed for Public Sector

Some persons in favor of public sector collective bargaining under federal law maintain that the National Labor Relations Act is indicative of a nation's desire to accord collective bargaining rights to workers, and that the exclusion of public employees from the Act was unintentional. Nothing could be farther from the truth! No better exposition of this issue exists than that presented by Dr. James Gross, Professor, Cornell School of Industrial and Labor Relations. A paper by Dr. Gross was presented at the 27th Annual Conference of the Association of Labor Mediation Agencies (now Association of Labor Relations Agencies) in Boston, Massachusetts, entitled, "Why Public Employers were Left Out of the National Labor Relations Act." Anyone interested in an exciting insight into the events which led up to the adoption of the NLRA, should read this paper.[16]

In this paper, Dr. Gross concludes:

> It is clear, therefore, that the application of the Wagner Act to even the private sector was of dubious constitutionality; it never occurred to anyone concerned with the advancement of the national labor policy of collective bargaining to suggest that public sector employees be included in the Act's coverage. Given

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[16]Selected Proceedings of the Twenty-Seventh Annual Conference of the Association of Labor Mediations Agencies (now Association of Labor Relations Agencies), July 23-28, 1978, Boston, Massachusetts. Published by Labor Relations Press, P.O. Box 579, Fort Washington, PA 19034.

> the fact that the new national labor policy had its roots in the private sector experience, the regulation of public sector labor relations had never been an element of the story. Furthermore, no piece of federal labor legislation enacted to date had encompassed the public sector. In short, inclusion of public sector employees in the coverage of the National Labor Relations Act was never an issue. . . .[17]

In 1937, President Franklin D. Roosevelt wrote:

> The process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and unsurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent full or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures or rules in personnel matters. Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees.[18]

## G. 1962: The Real Beginning

Employees of the U.S. Postal Service, under the protection of the Lloyd-LaFollette Act, have had the right to join unions longer than any other group of federal employees. Between 1912 (when the Act was passed) and 1962, there was limited growth in federal employee unions. Then on January 11, 1962, President John F. Kennedy signed his Executive Order 10988, which gave all federal employees (except management personnel) the right to join or not to join unions of their choice. E.O. 10988 was replaced in 1971 with E.O. 11491, which expanded unionization rights

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[17] Ibid., p. 92.

[18] From a letter by Franklin D. Roosevelt written to Luther C. Steward, President of the National Federation of Federal Employees, August 16, 1937. The letter was reprinted in Charles S. Rhyne's book, Labor Unions and Municipal Employee Law (Washington, D.C.: National Institute of Municipal Law Officers, 1946), pp. 436-37.

of federal employees. Both orders, however, provided for representation elections to determine exclusive agents and provided for the right to engage in comprehensive collective bargaining. Kennedy's action in 1962 was the real beginning for collective bargaining for all public employees, because it opened a legitimate door for the states to pass through.

Just prior to the signing of E.O. 10988, the special Task Force on Employee-Management Relations in the Federal Service released its report, which read in part:

> Despite the many differences between public and private employment, there has been a corresponding and somewhat similar development of employee organizations within the Federal Government. The Task Force studies indicate that some 33% of all Federal employees, altogether some 762,000 persons, including 482,224 in the Post Office Department, belong to employee organizations. This matches almost precisely the national proportion of organized workers in nonagricultural establishments exclusive of Federal employment, which was 32.4% in 1960. It is a proportion half again as great as that of the total labor force in which 23.3% of the workers are organized.
>
> This is hardly a recent development. Organizations of craftsmen have been active in Naval installations since the early 1800's. The largest union composed entirely of Federal Government employees, the National Association of Letter Carriers with some 150,000 members, was organized in the late nineteenth century and was one of the first affiliates of the American Federation of Labor. Almost one-half million postal employees belong to unions, most of which have been maintained for many years, frequently in the face of pronounced hostility. Postal workers are by no means, however, the only heavily organized group within the Federal service. Contrary to the widely held impression, only 41% of Federal employees are in the classified service, and only part of these are white-collar workers. A majority of Federal employees are either postal employees or blue-collar workers. Most of the latter work in industrial establishments much like those in the private economy, and are paid according to rates prevailing in nearby private industry. Union membership is common among these blue-collar workers.[19]

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[19] Report of the President's Task Force on Employee-Management Relations in the Federal Service (Washington, D.C.: Government Printing Office, 1961), pp. 2-3.

But even before E.O. 10988, in 1955 there were signs that public employees had already taken up union and association membership in large numbers:

> Municipal employee organizations were to be found in each of the 18 cities with a population of over 500,000. In all but ten, or in 95 percent, of the cities with a population of over 50,000 there were one or more labor organizations for municipal employees. In 58 percent of the cities with a population of less than 50,000, there were one or more labor organizations for municipal employees. Of the 1,347 cities with a population of over 10,000, 874 had employees who were members of one or more of the dominant organizations in the field. That membership was distributed in this fashion: American Federation of State, County and Municipal Employees, affiliated with the American Federation of Labor, had members in 365 cities. Beyond that, in 60 cities it operated locals composed exclusively of police officers. Government and Civic Employees Organizing Committee, affiliated with the Congress of Industrial Organizations, had members in 99 cities. International Association of Fire Fighters, an A.F.L. affiliate admitting only firemen, had members in 614 cities. In addition, unaffiliated organizations had members in 346 cities. In no instance do these figures include unions admitting to membership both private and public employees.[20]

Growth in public employee unions was also helped by the U.S. Supreme Court decisions in 1962 and 1964, which provided for reapportionment. These two decisions resulted in reorganizations of state legislatures which in turn brought about legislative arrangements more friendly to unions. In Michigan, for example, in 1965, after reapportionment had taken place, the state legislature was controlled by Democrats for the first time in twenty years. It was that legislature which passed one of the nation's first state collective bargaining laws for public employees in 1965. While that law, even today, prohibits strikes by public employees, it does include alternative provisions for handling negotiations impasses, along with prohibitions against specific unfair labor practices.

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[20]City of New York, Department of Labor, The Right of Public Employees to Organize--In Theory and Practice, 1955, p. 2.

The increase in collective bargaining laws has been the primary cause for the growth in public sector unions at the state and local levels of government. By 1970, the National Education, with about 1.5 million members, and the American Federation of Teachers, with about .5 million members, were the only two teacher unions. Almost all of the local teacher "associations" were affiliated with one of these two large organizations, except at the college level, where the American Association of University Professors was winning most of the representation elections. In 1971, the NEA joined with the American Federation of State, County, and Municipal Employees to form a political coalition. This coalition gained strength over the years and gave teachers a chance to be politically powerful, so much so that President Carter admitted that the vote of public school teachers was decisive in his election to the presidency.

The rapid growth of teacher unions was boosted by the 1961 breakthrough in the form of a mammoth labor contract negotiated by the United Federation of Teachers, covering over 45,000 New York City teachers. By 1980, forty states had collective bargaining laws.

Bills to provide mandatory national collective bargaining for all public employees have been before the U.S. Congress for years. And although the 1976 decision of the U.S. Supreme Court in National League of Cities v. Usery was a real setback for union forces, there is every reason to believe that pro-bargaining forces will continue to search for ways to obtain a federal law which would mandate collective bargaining for all public employees.

## H. Important Dates in the History of Collective Bargaining in the Private Sector

Middle Ages - Work guilds set job standards

Industrial Revolution - Capitalists controlled nature of jobs

1769 English Parliament made breaking of industrial machinery a crime.

1799 English Parliament outlawed unions.

1778 Journeymen printers of New York City combined to demand an increase in wages, which they obtained.

1786 The earliest authenticated strike of workers in the United States in a single trade occurred when Philadelphia printers gained a minimum wage of $6.00 per week.

1806 Members of the Philadelphia Journeymen Cordwainers were tried for criminal conspiracy after a strike for higher wages. The charges were (a) combination to raise wages, and (b) combination to injure others. The union was found guilty and fined. Bankrupt as a result, the union disbanded. This was the first of several unions to be tried for conspiracy.

1842 In the case of Commonwealth v. Hunt, the Massachusetts Court held that labor unions, as such, were legal organizations, and that "a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." The decision also denied that an attempt to establish a closed shop was unlawful or proof of an unlawful aim.

1888 The first Federal labor relations law was enacted. It applied to railroads and provided for arbitration and presidential boards of investigation.

1895 The Sherman Anti-Trust Act (of 1890) was invoked against Eugen V. Debs and the American Railway Union. Debs was imprisoned for violation of a federal injunction.

1913 The United States Department of Labor was established by federal law.

1914 The Clayton Act was approved, limiting the use of injunctions in labor disputes and providing the picketing and other union activities shall not be considered unlawful.

1933 Section 7(a) of the National Industrial Recovery Act provided that every NRA code and agreement should guarantee the right of employees to organize and bargain collectively.

1935 The National Labor Relations Act (Wagner Act) established the first national labor policy of protecting the right of workers to organize and to elect their representatives for collective bargaining.

1947 The Norris-La Guardia Act prohibition against issuance of injunctions in labor disputes was held inapplicable to the government as an employer (U.S. v. John L. Lewis).

1947 The Labor-Management Relations Act (Taft-Hartly Act) was passed on June 23 over the president's veto.

## I. Important Dates in the History of Collective Bargaining in the Public Sector

1917 Some Chicago public school teachers were dismissed by the Chicago School Board because the teachers had joined a teachers' union in defiance of a Board resolution against such membership.

1930 Some Seattle public school teachers dismissed for union membership.

1935 The National Labor Relations Act (the Wagner Act) was passed. Although the Act did not apply to public employment, it served

as a model for some who wished to have a national bargaining law for the public sector.

1935 The Tennessee Valley Authority, an autonomous federal corporation, adopted an employee relations policy which provided collective bargaining rights to TVA employees.

1951 Norwalk, Connecticut, teacher strike, resulted in allowing collective bargaining by mutual agreement of school board and teachers.

1955 Mayor Robert F. Wagner's Executive Order No. 49, in New York City, gave bargaining rights to City employees.

1959 Wisconsin passed a municipal bargaining law which granted collective bargaining rights to city employees, but no administrative rules were developed, so little bargaining took place.

1961 National Education Association adopted its "professional negotiations" resolution which gave the NEA's first endorsement of collective bargaining.

1962 20,000 New York City teachers were on strike for several days, drawing nationwide attention to public employee causes.

1962 A labor contract was entered into between the United Federation of Teachers and the New York City School Board.

1962 President John F. Kennedy signed Executive Order No. 10988, granting collective bargaining rights to federal employees, and paving the way for similar state laws.

1966 By this year several states had adopted bargaining laws for public employees.

1966 The public transit systems of New York City were closed by a labor strike.

1967 The Office of Collective Bargaining was created in New York City to govern bargaining by City employees.

1970 Executive Order 10988 was replaced with a more comprehensive Executive Order 11491.

1970 The first mass work stoppage was held for the first time in the 195-year history of the U.S. Post Office.

1970 A "limited" right to strike was approved in Pennsylvania's Act 195, governing collective bargaining.

1980 Forty states had some form of bargaining legislation.

## III. PRIVATE VS. PUBLIC SECTOR LABOR RELATIONS

Collective bargaining as practiced under the various laws applicable to the private sector, such as the National Labor Relations Act, cannot be applied to public sector employment relations without serious damage to social and economic fabric of the entire nation. These labor relations laws, of limited success in the private sector, would be a disaster in the public sector.

The fundamental reason that the private industry model for collective bargaining cannot be transferred intact to government services is that the two sectors are not comparable. Whereas the private sector is essentially a private economic matter between producer and specific consumers, government is essentially a public political matter between the government and citizens generally. Additionally, many government services are humane in nature; whereas, most private enterprise is based upon mutual gain. This fundamental incomparability of the private and public sectors is the basis for all of the many specific reasons that industrial labor-management collective bargaining cannot be transferred successfully to the public sector.

The National Labor Relations Act defines a private employer in broad terms deliberately so that the "rules of agency" apply. Thus, the term "employer" in private industry applies not only to the areas of management normally understood to be the employer group, but also to agents acting on behalf of the employer. Section 2(2) specifies that the Act ". . . shall not include the United States or any wholly owned

government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual. . . ."

This prohibition against applying the NLRA to the public sector was placed into the law for many reasons, not the least of which is that it was felt that the federal government had no constitutional right to insert itself into the labor relations affairs of state and local governments. But beyond that reason, there are many reasons why, then and now, the NLRA would be inappropriate for the public sector.

In contemplating the transfer of the NLRA to the public sector, or the establishment of any other collective bargaining law in the public sector, the following points need to be considered.

1. Right or wrong, the NLRA is based on a concept that there should be an economic balance between company owners and company employees. The Act itself is proof that the lawmakers felt that collective bargaining is the way to achieve this economic balance. The Act is based on an assumption that both the company owners and the unionized company employees need the cooperation of each other in order to survive. In the event of labor strife and the employees go on strike or the company locks the employees out, the Act assumes that the parties will be forced back together eventually, since the employees need their salaries from the company in order to avoid starvation, while the company needs the employees in order to stay in business and in order not to lose the investments in the company. Although the author does not accept this basic premise of the NLRA, the fact is that the Act is built on this belief. Any imbalance in the economic force between the parties would

be advantageous for one and disadvantageous for the other. For example, if striking employees were given their regular salaries by the government during the strike, there would be an imbalance in the economic power of the parties, in that the employees would have no incentive to return to work, thus placing the company at a distinct disadvantage.

In the public sector, there is no similar situation for two primary reasons:

(a) Government cannot go out of business. Government services are required by law. These services are required by law because they are viewed as vital to citizens. No matter how many foolish concessions might be made at the bargaining table, the government agency conducting negotiations cannot, by law, go out of business. Whereas, in the private sector, if a company conducts its labor negotiations in an irresponsible manner, the company will cease to exist. In other words, the market place is the ultimate curb to wrong decisions in the private sector. There is no market place for government decisions.

(b) Government services are generally essential and almost always monopolistic. When a government agency is closed down temporarily by an organized union strike, the citizens have no place else to turn for government services essential to their needs. In the private sector, however, if one company producing shoes is closed by a labor strike, the consumer simply buys from another company. When a government agency is faced with a shutdown due to a strike by its employees, considerable political pressure is generated on the agency by citizens to keep services operating. The agency therefore is faced with two unacceptable

choices:

- Refuse to concede to union demands and run the risk of not delivering essential services to citizens; or
- Concede to union demands, thus imposing a burden on taxpayers not anticipated and not approved free of duress.

*The private sector offers more options to the consumer than does the public sector offer to the taxpayer.* In private sector transactions, the consumer can make substitutions in his purchases. For example, if grapes have been driven beyond an acceptable price due to unionization of the grape workers, the consumer can substitute some lesser priced tasty fruit. However, when government services have been driven to an unacceptable price by unionization of public employees, the taxpayer has no substitute to choose. The taxpayer's only choice is to petition his government or seek to reduce taxes generally, which might not even solve the specific problem which the taxpayer originally faced.

As a result of the opportunity to make substitute consumer choices in the private sector, there is more pressure on companies and their employees to keep their product or service competitive, which often means resisting costly labor contracts. Such economic pressure for reasonable settlement is less present in the public sector, thus creating more potential.

2. Many government agencies, e.g., school districts, do not have the power to set a tax rate in order to pay for concessions made at the bargaining table. Consequently, many school boards have to face a serious dilemma when the funding body, e.g., county board of supervisors, fails to appropriate sufficient funds to underwrite the salaries and benefits negotiated by the school board. In such a situation, the

school board is left with only two choices, both unacceptable:

(a) Fund the negotiated salaries by transferring money from other accounts. This is unacceptable because such transfers of such funds deprive other school departments of justified entitlements.

(b) Renege on the negotiated agreement. This option, too, is less than acceptable because the organized employees are given a justifiable excuse for turning hostile to the school board.

Private companies do not face this problem. In almost all cases of labor negotiations in the private sector, the tentative agreement reached at the bargaining table is the agreement approved by management.

3. The budget of most government agencies (e.g., school districts) is attributable largely to personnel costs. How can the public interest be served equitably when a school board, for example, is required to negotiate with only one portion of its constituency--its employees--on matters which cover 80 percent of its budget? Such an arrangement gives the organized employees of the school district (some of whom may not be citizens of the community) more voice in tax and budget matters than other citizens. There is no similar problem in the private sector because companies have no obligation to render public services.

4. When public employees have the right to collective bargaining, it is on top of a right which private employees do not have--the right to exert political influence on the employer. As far back as 1967, one expert, Kurt L. Hanslowe, a member of the Cornell University faculty, stated that collective bargaining in the public sector ". . . has the potential of becoming a neat mutual back-scratching mechanism, whereby public employee representatives and politicians each reinforce the

other's interest and domain, with the individual public employee and the individual citizen left to look on, while his employment conditions and his tax rate and public policies generally are being decided by entrenched and mutually supportive government officials and collective bargaining representatives over whom the public has diminishing control."[1]

*The single most important threat of collective bargaining is that it distorts economic and political balance of the nation, by vesting too much power in the hands of unionized workers and their private unions.* Although only a minority of American workers have joined unions in the private sector, it is clear that their unions have achieved political clout disproportionate to their numbers and size. The danger of disproportionate clout is even greater among unionized public employees, because they cannot only influence government as citizens, but they can also influence government to their special interests at the bargaining table. In other words, the private sector employee can only petition his government, while the public employee can negotiate with his government.

5. As far as labor relations is concerned, management in government is weaker than its counterpart in private industry. One reason that management in private industry can survive unionism is that it possesses considerable "management initiative," a quality which allows company managers to run the company in the best interest of the owners. Such management initiative is less prevalent in the public sector for many reasons.

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[1] The Emerging Law of Labor Relations in Public Employment, Kurt L. Hanslowe, Cornell University, 1967.

(a) Many government administrators and supervisors stand to gain as rank and file employees receive negotiated improvements in salaries and benefits, since the salaries and benefits of managers in the public sector are often indexed to that of the labor force. Consequently, government bureaucrats may lack the needed incentive to resist exhorbitant union demands.

(b) The presence of conflicting political pressures on top level managers in government service has a chilling impact on their initiative to make clear decisions in the best interests of the agency and the public it serves.

(c) The governing bodies of many government agencies, e.g., school boards, experience a very high turnover, creating a shortage of experienced policy makers. This phenomenon produces too frequently persons who are unable to provide informed leadership for clear management decisions and persons who are too often manipulated by the union.

(d) Some members of governing bodies of public agencies seem uncertain as to whether they are "bosses" or politicians. On the one hand, they are expected to manage an organization; while on the other hand, their decisions are often influenced by political factors not necessarily in the overall best interest of the agency and the public-at-large. In some cases, a member of a governing body is actually under the control of the employee union by virtue of the fact that the union members may have been the deciding force that put that person into public office. Such persons truly prostitute their public office by catering to the special interests of the agency employees over the

general interests of the citizens. Unlike the public sector, boards of directors in the private sector have little confusion as to whether they are bosses or politicians. Consequently, management of private companies is more decisive than management of government agencies, resulting in generally more efficient operations.

(e) Whereas owners of private companies generally view their executives as positive forces in the welfare of the company, such a productive relationship does not always exist in the public sector. It is not uncommon for governing bodies and their executive forces in public agencies to have a hostile relationship; the governing body viewing the administrators as an impedence to their will, and the administrators viewing the members of the governing body as a threat to their job security and an obstacle to running an efficient agency.

(f) Employees in private industry generally can be dismissed more easily than is the case in government service. Although a dismissed employee in private employment may have some right to appeal through the grievance procedure in the labor contract, such an employee lacks the many legal job security protections available in public service. Consequently, government management is less able to discipline employees than is the case in the private sector. As a result, public employees cannot be made to perform as efficiently as private employees.

(g) Unlike a private company, a government agency has no profit or loss incentive. Efficient government operation results in no profit and inefficient government operations results in no loss.

Therefore, the consequences of unwise concessions at the bargaining table are less a concern in government service than in private enterprise.

As a result of the factors listed above, as well as other relevant differences, a major overall difference between private sector management and public sector administration can best be stated as follows:

*Whereas private sector managers assume they can do anything that they are not specifically prohibited from doing, public sector administrators seem to believe that they can do only those things which they are specifically authorized to do.*

6. Public agencies generally have less flexibility of operations than exists in private industry. When faced with problems created by employee unions, a government agency is unable to exercise several options available to a private company. For example:

(a) A private company can go out of business rather than capitulate to union demands. A government agency must stay in business by law, no matter what actions are taken by the union. As a result, a government agency can agree to matters at the bargaining table which would not be tolerated by a private company. Nor can a government agency be sold to escape an objectionable situation. Nor can a government agency move to escape an unwanted union.

(b) Whereas a private company can change its method of production, or even change its product, a government agency can never change its product (service) and can only slowly change its method of production (operation). Surrounded by laws, ordinances, regulations, and political forces, a public agency

is often slow to make needed adjustments to problems created by restrictive labor contracts.

7. The right to petition their government is a sacred right of U.S. citizens, protected by their Federal Constitution. This implies that all citizens should have an equitable right to influence their government's actions. It is understandable that some employees might want to establish their salaries, benefits, and working conditions through a process of collective bargaining by an exclusive representative. It is also understandable that all employees, both public and private, have a right to look out for their own welfare. However, they do not have a legally protected right to bind their employers on matters which deprive management of its right to manage and produce its goods and services as it sees fit. This caveat is even more applicable to the public sector. If government is to be responsive to all citizens, it must retain its policy-making and law-making powers, especially in areas involving service to citizens. If public employees want to bind themselves contractually on matters affecting their own exclusive welfare (i.e., compensation and benefits), that's their business. But public employees should have no right to negotiate labor contracts which interfere with government's obligation to serve all citizens in an equitable and economically efficient manner.

A private company, unlike a government agency, has a private obligation to serve only its customers. At any point that the customers are dissatisfied, they can go elsewhere. However, a government agency has a public obligation to serve all citizens. Therefore, the scope of bargaining in a public labor contract must be more narrow than that in the private sector. This need for a narrow scope of bargaining and the

organized union's expectation of a broad scope of bargaining inevitably leads to strife between public employees and public employers, a situation harmful to society as a whole.

### A. A Special Word About Strikes

Each of the above reasons demonstrates fundamental differences between public and private bargaining, and each item above contributes support to a prohibition against strikes by public employees. Public employee strikes should be prohibited on one or both of the following grounds:

(a) The essentiality of many government services to the health, safety, and welfare of the community; and

(b) The belief that the strike is principally an economic weapon inappropriate to public employment.

Strikes by public employees cannot be construed as similar in any way to strikes in private industry, in that unique and vital services are involved, which are provided by a governmental unit which in many cases operates under monopoly or near-monopoly conditions. These services cannot be purchased by citizens except through these government agencies. Strikes by public employees are, in fact, strikes against the entire community, and unless the government is willing to establish competing agencies to provide alternative sources for these services, stoppages in these vital and unique services simply cannot be tolerated. Under present circumstances, however, public employers become the easy targets for unreasonable union demands.

Strikes do not serve the same economic purposes in the public sector that they serve in private industry. Strikes by public employees

demonstrate no fair relationship between economic gains for the strikers and the damage their monopoly status enables them to inflict on their fellow citizens. In the case of public employees, the strike threat is a political, not an economic, weapon, and its use grants unfair power to a small group over the larger public group. If all people can be made to suffer through the willful display of monopoly power possessed by a few organized employees, it becomes the obligation of the government to provide effective machinery for protecting the public interest.

The air controllers' strike in 1981 was the epitome of raw power through the withdrawal of essential and monopolistic services to the public. In that strike, a small maverick union caused two-thirds of the nation's air controllers to go on strike. The resulting harm to innocent citizens was so severe that the lodging of criminal charges against each controller personally would have been justified. In that strike we saw an example of just how far a small group of public employees will go to improve their own selfish welfare. Although the union's press releases indicated that the strike was pulled on behalf of the public's best interests,[2] the real issues were:

(a) The controllers wanted considerably more money for considerably less work; and

(b) The union leadership wanted to prove its power.

This one obscene strike did more to teach citizens about the dangers of public employees strikes than could have been done by any other means. As the Praetorian guards were trusted to guard Rome, but ended up sacking

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[2]The union claimed that the strike was initiated because the skies were unsafe for the public, due to the fact that the FAA computers were not modern enough and that air controllers were subject to error due to overwork.

that city, so did the air controllers violate a sacred compact with the people who put them into public office by attempting to exploit their essential positions.

In 1970, the U.S. Supreme Court ruled that federal employees do not have the right to strike. The high court affirmed a lower court judgment that upheld the constitutionality of a federal law prohibiting strikes by public employees. This particular decision dealt with a case brought by the United Federation of Postal Clerks and it settled an issue that had long been debated. Some observers believe that this ruling could be extended to cover all state and municipal employees including teachers. Although many states have public employee anti-strike laws, some have been challenged in the courts as violation of the constitutional free speech guarantee of the First Amendment. The high court has also affirmed a lower court ruling upholding the constitutionality of a New York law requiring a no-strike pledge from any union that represents state employees.

### B. In Summary

This section has discussed many relevant factors which must be considered in transferring the NLRA to the public sector or in establishing any collective bargairing law in the public sector. The many reasons why the industrial model for bargaining should not be used in government service can be summarized as follows:

1. The strike is unlawful for public employees for good and valid reasons. More effective means for enforcing these laws are required.

Even in the private sector there is no absolute and universal right to strike, since the nation has witnessed court injunctions against strikes by coal miners and railroad workers.

2. The legal framework for industrial collective bargaining developed in response to economic and social needs which are totally different from those that exist in the public sector today.

3. Government decision making is highly diffused and involves a mixture of administrative and legislative functions. This mixture permits the opportunity for misunderstandings and increases the political power of unionized employees at the expense of the public interest.

4. Collective bargaining helps remove from the public the influence and control of the cost and determination of governmental services. The democratic process requires greater public participation, not less.

5. Governmental agencies usually have monopoly control over the delivery of essential services which helps invalidate the working of countervailing economic pressures. This transforms the public collective bargaining process into one of political pressures between unequals.

All of these reasons demonstrate the differences between public and private sector collective bargaining. These fundamental differences suggest that a totally new mechanism is required, not the transplantation of the industrial model. Besides, the NLRA could not be transferred successfully to the public sector. The National Labor Relations Board and the federal courts have handed down countless

interpretations and precedents which were based on the uniqueness of the private sector. Almost none of these decisions could be applied reasonably tc the public sector scene.

## IV. THE UNION ENTERS

Almost all nonmanagement federal employees have the right under Federal Executive Order to engage in collective bargaining, and most of the states have laws which provide collective bargaining rights to local and state public employees. Even in the few states which do not have bargaining laws, public employees have a constitutional right to join a labor organization, even though there is no legal right to require the employer to engage in collective bargaining. And in the private sector, almost all nonmanagement workers have a legal right to require that the employer engage in collective bargaining, under certain conditions. Therefore, it is not surprising when the union knocks at your door, if you are a manager or employer.

### A. Teachers and Other Government Employees Have a Constitutional Right to Join Unions

Under the constitutional right to freedom of association, a number of court decisions have permanently settled the issue of whether or not public employees have a right to join a labor union. In 1968, a federal court of appeals invalidated the dismissal of some public school teachers who were fired for joining a union.[1] Even if a union has a reputation for engaging in illegal strikes, a public employee may still join the

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[1] McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); American Federation of State, County and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969).

union.[2] However, there is no constitutional requirement that a school district or other governmental jurisdiction recognize a labor union for purposes of collective bargaining. The public employees' right to collective bargaining results from state laws (or local ordinance in some cases), or from a U.S. presidential order, in the case of federal employees. Where no collective bargaining law exists, the right to collective bargaining is left to the discretion of the public employer, except in the case of the State of Virginia. where the Virginia Supreme Court outlawed collective bargaining which was taking place in a public school district. It is generally assumed by those familiar with the Virginia situation that the Court's decision would preclude all public sector collective bargaining as long as there was no enabling legislation.

### B. Public Employees Cannot be Required to Join a Union

There is no constitutional or legal requirement that forces any public employee to join a labor union. There are, however, a number of state bargaining laws which allow the public employer (e.g., a school board) to enter into an agreement with an exclusive representative of its employees which requires that employees pay a service fee to the union or be dismissed from employment. In 1977, the U.S. Supreme Court supported this concept and also ruled that individual public employees

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[2]Police Officers Guild, National Association of Police Officers v. Washington, 369 F. Supp. 543, 552 (D.D.C. 1973).

could seek an injunction against union support of causes which the individual public employee objected to.[3]

### C. There is No Constitutional Right to Automatic Dues Deduction

Membership dues are the life blood of a union. Consequently, automatic dues deduction from the member's paycheck is of utmost importance to the union. However, the only way that such a "dues check-off" can be obtained by the union is by appropriate provision in the state's bargaining law or by acquiescence of the public employer at the bargaining table. Otherwise, no public employee can have his union dues automatically deducted from his paycheck by his employer and remitted to the union. In 1976, the U.S. Supreme Court supported this concept by stating that the firefighters union had no constitutional right which required that the public employer (the City of Charlotte, North Carolina) deduct union dues from the paychecks of those firefighters who were members of the union.[4]

The purpose of this section is to provide information regarding: (1) why public employees join unions, (2) how unions organize public employees, (3) the telltale signs of unionization, (4) why unions should be resisted, and (5) what employers can and cannot do in dealing with unions. By providing this information, public employers should be better equipped to prevent unionization, or to get started right with the union, should one be organized.

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[3]Abood v. Detroit Board of Education, U.S. 431 (1977) 209.

[4]City of Charlotte v. Firefighters, local 660, 426, U.S. 283 (1976).

1. **Why do employees join unions?**

Several million public employees belong to labor unions and support the collective bargaining process. Why do these employees contribute a portion of their hard-earned salary to labor unions, and why do many of them give a portion of their precious spare time to union activities? There is no one reason why employees join unions; there are many reasons. There are, however, three common overriding reasons why employees join unions. Those three reasons are:

(a) Many employees have a perception that unionization is better than nonunionization.

(b) Many employees are influenced by peer pressure and custom to join a union.

(c) Many employees are influenced by the pressures organized by the union itself.

Each of these overriding reasons for union membership will be discussed, and then other secondary reasons will be examined.

Perception. Many workers in both the private and public sectors believe that unionized workers generally earn higher wages than non-unionized workers and that unionized workers in specific industries earn higher wages than nonunionized workers in comparable industries. Although there is some evidence that these beliefs are true, there are so many exceptions that employees (and employers) should be cautious in applying this general truth to all situations. Even where unionized workers earn higher wages than nonunionized workers, it should be recognized that the higher salary is at the direct expense of other workers not unionized, the consumer, and the taxpayer. In other words, another person pays for the inflated wages paid to union

members, wherever their salaries are higher than the market would support in the absence of unionization. You see, unions do not produce anything. As a matter of fact, most unions resist measures to improve productivity. The only way that unions have to provide higher wages to their members is to use their collective power of intimidation to divert money from other sources. Again, unions do not produce anything; they can only force the redistribution of earned wealth from one person to another.

In the private sector, the high wages of auto workers is provided by paying nonunionized employees a lower than average wage and by charging the consumer a higher price than is supportable by a free market. In the public sector, any excessive wages granted as the result of union pressure are paid for by the taxpayer, most of whom are workers just like the public employee. Although large industries, like the American automobile industry, and governments, like New York City, may be able to get by in the short run by stealing from one group to give to another, in the long run such a practice spells doom not only for Chrysler and New York City, but for society as a whole, which includes all workers, whether they are unionized or not. Although the $30,000 a year assembly line worker for Chrysler and the $30,000 a year garbage collector in New York City may enjoy a temporary unearned high standard of living due to the intimidation power of their union, what good are such benefits if their work is terminated due to bankruptcy of the employer? Or, if not terminated, how far do these wages go in a society that steals 10 percent of everybody's wages each year through a government-sponsored tax collection system called inflation?

As interesting as all of this may be, however, the fact is that people are generally motivated by strong innate drives of self-interest. And, as long as public workers believe that unionization is better for them than nonunionization, they will continue to turn to the union in an attempt to improve their collective and individual interests.

Union pressure. In order to sign up members, the union will promise much. It will promise job security, dignity in the work place, higher salaries, protection from the boss, less work, more time off, and practically anything else which the employee would like to hear. However, a union can guarantee nothing. As a matter of fact, a union will not mention the disadvantages of having a union shop. Keep in mind, however, that a union gains exclusive representation rights over all employees in a unit if only 51 percent vote for the union. In other words, even if 49 percent of the employees do not want a union, they must have one.

The author's own personal experience in dealing with rank and file workers and unions reveals a host of disadvantages in unionization. Some of those disadvantages are:

(a) Continuous unrest and discontent often accompanies unionization, because in order to survive, the union must always have a cause to pursue, even if it creates one. Consequently, the typical union shop lives with a continuing series of disputes, which detract from peaceful working condition.

(b) Undelivered union promises are an integral part of labor-management relations in a unionized agency. In order to continue to keep the support of the employees, the union must make

promises to deliver more each year. Naturally, such a process cannot continue without end. As a result, the adversary relationship between the worker and his employer increases.

(c) Employees lose much of their personal freedom to deal directly with their work situation and their employer, because all such relationships must be handled between the union and the employer. In other words, the employee loses control over his own life at work by the intervention of the union. This loss of freedom is demonstrated by provisions of the labor contract which have a general tendency to stultify the agency.

(d) Many employees may be forced to join the union against their will, or at least to pay a fee to the union against their will. Keep in mind that it's possible under normal circumstances that 49 percent of the employees didn't want a union to begin with. In order to force these employees to support the union, the union employs many intimidating tactics. In some states, the collective bargaining law permits the negotiations of an agency shop, a situation where the nonmember must pay a fee to the union or be fired.

(e) Unions often mean strikes, and strikes mean loss of income and acrimonious working relationships. Since the advent of collective bargaining in the public sector, strikes by public employees, including federal employees, have steadily increased each year. But even if an actual strike is not experienced in the union shop, the threat of strikes is ever present in the collective bargaining relationship. How many employees fully realize the

deleterious impact such union-sponsored actions will have on their careers?

(f) Under unionization, some workers find the union to be their enemy, rather than their friend. The union often becomes just one more unresponsive bureaucracy to deal with. And, in the most sordid union environment, acts of violence and harassment are perpetrated against "uncooperative" workers.

Peer pressure. One of the most effective techniques for encouraging employees to join a union is through the use of spontaneous and union-sponsored peer pressure. This tactic is quite persuasive in that most workers are reluctant to create animosities among colleagues with whom they must work on a daily basis. For most union members, the nonmember is a "free rider" and a potential threat to the success of the union. Given this attitude, is it any wonder that some union members are quite intimidating in their efforts to sign up nonmembers?

(a) Many Other Reasons for Union Membership

Although the perception that unions are advantageous, and the pressures from the unions, custom and peers are overriding reasons that employees join unions, there are other reason too, such as:

(1) Enabling legislation

Naturally, the absence of a state (or federal) law which makes collective bargaining mandatory upon petition of a majority of employees, is a serious obstacle to collective bargaining. Conversely, the presence of such a law is a significant inducement to employees to engage in collective bargaining. All one need do is look at the number of public employee union members in states with bargaining laws and the number of

such persons in states without bargaining laws to conclude that the presence of enabling legislation is a compelling force in the expansion of unions in the public sector. Very likely, if collective bargaining was left to mutual agreement between employer and employees, there would be very little collective bargaining in any government agency. Although many public employees and many public employee unions may be pleased with the special clout provided by bargaining laws, governmental leaders and taxpayers are less than equally pleased.

The fact that collective bargaining is forced on employers (and many employees) in both the private and public sectors, creates an adversary, and sometimes hostile, relationship between employees and their benefactors. When management and employees view each other as enemies, both parties are harmed eventually. Ideally, negotiations is a process used voluntarily by two or more parties who want something that cannot be obtained unilaterally, but must be obtained by mutual agreement. When one buys a car, there is no law that says the dealer and consumer must negotiate. The dealer and the consumer negotiate because it is to their mutual advantage to do so. When one buys a home, there is no law that says either the buyer or seller must negotiate. They both negotiate, however, because they are both seeking something which cannot be obtained unilaterally. Throughout history, negotiations have been a natural process used between people in order to benefit mutually. Should there ever be a law which would require a car dealer or home owner to negotiate upon request of the buyer, obviously, such a law would benefit one party at the expense of the other, thus destroying the fundamental nature of negotiations.

A fuller discussion of the inappropriateness of collective bargaining in public service and the differences between collective bargaining in the private sector and collective bargaining in the public sector is found elsewhere in this book.

(2) Unresolved grievances

In the absence of a labor contract, many government agencies and school districts have failed to develop procedures for employees to air their complaints. To operate a place of work without complaints from employees is impossible, and when employee complaints exist, there will be an outlet found in some way. If there is no official channel for them to review their complaints, the employees will discuss their concerns with other employees, or undertake to sabotage the employer in some subtle ways. Or, the employees may take their concerns directly to the public. All such actions are far less preferable than resolving complaints through an established grievance procedure which is just and protects the grievant from retaliation.

Where no adequate grievance procedure exists, employees are often attracted to a union as a source of aid and protection. When an employer persists in not responding to the legitimate complaints of its workers, sooner or later the employees will seek outside help, usually in the form of a union. On the other hand, the employer who listens with an open mind to employee concerns and sincerely attempts to resolve disputes in a fair manner is less likely to face a union request for representation.

Any employer who refuses to respond to legitimate concerns of the employees deserves a strong union, because an enlightened employer is obligated to care for the employees as much as he cares for his

customers, or taxpayers--in the case of public service. If the employer has no regard for the employees, and if the employees view the employer as an opponent, why shouldn't the employees draw together in an attempt to protect their legitimate interests? Consequently, all nonunion government agencies should provide an appropriate grievance procedure for nonmanagement employees. More about the elements of such a procedure will be discussed later.

(3) Poor working conditions

Many public employees, from trash collectors to physicians, have joined unions in an effort to improve their working conditions. For decades prior to collective bargaining in public eduction, teachers complained bitterly about large classes, poor student discipline, too much paper work, etc. Heavy case loads was the precursor to unionization of many social workers and public nurses. Many urban sanitation workers have organized in order to correct unsafe working conditions and job requirements which were too demanding. And, of course, who could forget the allegation of the United States air controllers, who were almost successful in shutting down American commercial aviation, that their working conditions were too "stressful." Notice that the word "allegation" was used in the previous sentence, for it often makes no difference whether working conditions are actually bad or only perceived as bad, as probably was the case of the air controllers. After all, employees will act according to what they perceive, even if what they perceive is not reality.

Once collective bargaining is permissible in a government agency, the union, with the support of certain workers, must have a cause around

which to rally the workers; otherwise, there is no need for the union. So, if the public employer is managing an operation which is unsafe for employees or an operation where employees are (or perceive they are) subject to overwork, stress, or other forms of similar treatment, the union has a ready-made opportunity to unionize the workers.

To minimize the risk of unionization due to improper working conditions, the employer should make every effort to create a reasonable working environment. Even if a perfect employment condition cannot be achieved, the mere effort by management to help employees will not go unnoticed. Most employees recognize that there are certain onerous aspects of their jobs which cannot be totally removed, but the typical employee does appreciate any sincere effort by management to improve working conditions. Such effort indicates to the employee that the employer cares, and such caring can do much to remove inducement for employees to join a union.

(4) Unequal treatment

Most employees accept the fact that their jobs have certain unpleasant conditions about which little can be done realistically. For example, nurses recognize that their profession requires periodic night work, unpleasant as it may be. Sanitation workers recognize that they must often work outside during bad weather. All jobs have something unpleasant which is indiginous to that job, and most employees accept the fact that very little can be done about such conditions from a practical point of view.

But if there is any one condition which is inexcusable and avoidable which is most offensive to employees, it is unequal and inequitable

treatment. Somehow, unpleasant working conditions are more endurable if all employees are treated equitably. For example, one sure way to create dissension in the ranks of sanitation workers is to select certain trash collectors on the basis of personal friendship to ride inside the truck during inclement weather. Similarly, a guaranteed tactic to alienate a staff of nurses is to protect certain nurses from night work on the basis of personal favoritism.

Another form of inequitable treatment can be caused by improper job classification, where positions of comparable work are assigned non-comparable pay and benefits. For example, central office secretaries are often paid higher salaries than field secretaries, even though their jobs might be comparable. In some cases, employee promotions are made on some basis other than merit. Almost anyone who has held any job has observed at least one case where an employee was promoted over a better qualified employee purely on the basis of some form of personal favoritism. Such inexcusable acts cut deeply into the morale of workers, and in the long run, harm the entire agency operation.

Employees are motivated to perform better when they believe that meritorious work is rewarded, and when they see this fundamental principle violated, their attitudes and performance are correspondingly and justifiably damaged.

(5) **Better pay and benefits**

As long as union members are paid better (or are perceived to be paid better) than nonunion workers performing comparable work, nonunion workers will tend to seek to organize, and why not? If a nonunion employer does not pay as well as a union employer, why shouldn't the employees conclude that they need a union? One could conclude from this

question that unionization in the public sector can be avoided easily by simply paying employees salaries which are closer in line to salaries offered for comparable positions in the private sector, or salaries which are competitive with comparable jobs in other government agencies. But such a solution is easier said than done. Due to the many reasons discussed elsewhere in this book, most government agencies lack the wherewithall to provide wages and benefits which guarantee that no union will emerge, since unions emerge for many reasons as described in this chapter. Even where government employees have been paid better than other comparable employees, those same employees have unionized. Conversely, there are government employees in states with bargaining laws where wages and benefits are below the average for comparable work and these employees have not been unionized. All of this is not to suggest that improvements in wages and benefits are a futile effort in avoiding unionization of the workforce. Granted, good pay and benefits are no guarantee of a union-free shop, but poor wages and parsimonious benefits are a definite invitation to the union.

(6) Lack of status and dignity

The author is convinced that a driving force behind the unionization of over one million public school teachers has been a general belief among teachers that they are "second class" citizens. On countless occasions, the author has heard teachers complain caustically that although they are good enough to teach the children of parents, they are not good enough to be paid salaries sufficient to enable them to live in the same neighborhood with those parents. Nurses, as a group, also express similar feelings of lack of status and dignity. Granted, in both the case of teachers and nurses the "low" pay and benefits might

be related to sex discrimination, in that females occupy the majority of teaching and nursing positions. But regardless of the cause, a sense of second class citizenship can be the cause for many public employees to form a labor union.

Where employees express a general concensus that there is lack of status and dignity in their work, the employer should take notice of this expression and undertake corrective measures. Programs of public awareness and employee recognition can do much to enhance the status of employees. For example, awards to custodians who maintain clean buildings convey to custodians that their work is important. Uniforms for maintenance personnel not only are an important fringe benefit, but also give the employees a sense of dignity and status and provide a feeling of belonging to an important team. Such sincere attempts to recognize all employees as vital members of an important team can remove one of the potential causes for unionization.

(7) Hidden problems

The employees of some government units are so suppressed and intimidated that employee exploitation, inefficiencies, cronyism, graft, and general malfeasance go unrevealed. Such situations are often very difficult to correct in that they frequently have their roots in a malevolent political environment. In some such cases, however, some courageous employees have come forward and in other cases, the employees have organized a union in order to obtain protection. In other cases, only a grand jury investigation has been able to uncover such wrong-doings.

(8) Failure of the employer to rebut

Within a brief ten years, from 1965 to 1975, over two-thirds of the states enacted collective bargaining laws for public employees and several million public employees chose to engage in collective bargaining during that period. In the thousands of school districts and government agencies where some employees sought to unionize and obtain recognition, the public employer made no effort to rebut those who spoke on behalf of unionization, despite the fact that in all such instances, the employer had the right to express its views regarding unionism and collective bargaining. In almost all cases, the public employer seemed to assume that all public employees wanted to belong to a union and wanted to be represented for purposes of collective bargaining. This assumption was wrong then, and it is wrong today. Many public employees do not want to belong to a union and do not wish to be represented for purposes of labor negotiations. But despite this prevalent anti-union attitude among many public employees, public employers, generally, have made, and are making, a few attempts to rebut the unions' arguments for unionization.

Under the right conditions, representation elections can be won, and have been won, by the employer. For those public employers who do not have unions and who do not want unions, there are many legitimate ways to keep the union out. Many suggestions for doing just that are explicit and implicit in this book.

(9) Discrimination

Some unions have been encouraged by acts of illegal discrimination, particularly on the basis of race and sex. Many of the strikes by sanitation workers, like those in Tennessee during the 1960s, were based

upon the perception by the employees that they were being mistreated job-wise due to their black race. And in a California municipal dispute in 1981, a union, on behalf of a group of female workers, sued the city in order to correct alleged comparable pay violations. These two examples are just two cases from dozens where discrimination was a factor in encouraging unionization. Needless to say, no employer should allow illegal discrimination to exist, irrespective of union consideration.

### Unions Can Be Avoided

For the past several pages, we have discussed the major reasons why public employees join labor unions. Although unions will exist in some government agencies almost regardless of countervailing circumstances, unions can be avoided in some situations. By being familiar with the major factors leading to the formation of unions, an employer can do much to help assure the continuation of a union-free shop.

## 2. How do unions organize?

In order for unions to exist, they must have members who pay dues. Therefore, the need to have access to employees and the need for automatic dues checkoff are two very important demands of unions. If unions were allowed to communicate with employees only at their homes, and if unions had to rely solely upon manual collection of union dues, unions likely would not have as many members as they have now. That is why in any negotiations with unions, their proposal for access to employees on the job and their proposal for automatic dues checkoff are of the highest priority.

(a) The Employer is Chosen With Care

Once a union is established in an agency, recruitment for additional members from the workforce is continuous; but how does a union go about getting a toehold in school districts, municipalities, and other governmental units where no union exists? First of all, only certain employers will be picked to unionize, since some employers offer greater potential than others, and since unions have finite resources, they cannot generally afford to expend their funds in agencies where there is no reasonable hope of organizing success. No single factor is used in determining what employer the union shall attempt to organize. A number of factors are considered, and some of them are:

(1) The weakness of the agency's resistance

Generally speaking, a union will hesitate to organize an employer which is strong and committed to keeping the union out. Such strong employers usually have a united governing body and an effective management team. Additionally, strong employers of necessity have a workforce with strong loyalties to their employer. On the other hand, a weak employer is one which has a divided governing body, an inefficient and disloyal management staff, and an alienated workforce. Given other proper conditions, such an employer is a likely possibility for organization.

(2) The size of the agency

It was not by chance that large cities and large school districts (New York City, for example) were the first places for unions to concentrate their organizing efforts. Given the right conditions, large agencies offer the best possibilities to organize a labor union for a number of reasons. Such jurisdictions have large number of employees

which represent a plentiful source of dues income. Additionally, large jurisdictions often are very bureaucratic, and there is often a rift between management and labor. Also, employees in such agencies often lack a sense of esprit de corps with their employer. Large agencies usually have large numbers of persons geographically close together, making mass contacts easier than in a rural setting. Furthermore, organizing developments in large cities and large government agencies are more likely to be reported on the national news networks, thus giving the union needed nationwide publicity helpful to organizing efforts elsewhere.

Bigness alone, however, is no guarantee that a city will be the first target of a union. A large number of small school districts and municipalities have often been the first place where unions have directed their organizing efforts. Such districts were chosen for a number of reasons, smallness being just one reason in many cases.

(3) Attitude of employees

Naturally, unions are attracted to areas where a large number of employees are already receptive to unions. For example, a municipality located in an area where most of the private sector workforce is unionized is often a good possibility for the union, because many of the friends and relatives of the local municipal employees are union members, and as such, likely to support the unionization of public employees.

The prevalence of grievances can be a good reason for employees to be receptive to unionization efforts. In such cases, the mere fact that grievances are prevalent is an indication of an employee relations problem of management having failed to respond to employee concerns.

Given these circumstances, the employees can be expected to seek a union to protect their best interests.

In some governmental jurisdictions and school districts, employee relations problems have worsened beyond prevalent grievances. For example, when New York City, Philadelphia, and other similar large cities were unionized, a serious rift already had developed between management and the teachers and other public employees. Where such rifts exist, the union has a waiting and ready-made membership.

(4) Geographic location

Sometimes the actual geographic location of a school district or municipality can influence the potential for unionization. In examining the history of public sector bargaining, one finds that the earliest unionization efforts took place in metropolitan areas. Therefore, school districts and counties adjacent to large cities historically have been subject to unionization efforts before similar jurisdictions remote from the metropolitan area. The reason for this phenomenon is that once a union gets a toe hold in a large city, organization drives in the surrounding suburbs are much easier than organizing drives in districts more distant from the city.

(5) Nature of the employment situation

Part of the reason that public school teachers were unionized more rapidly than all other public employees was that there were already two exclusive organizations representing teachers in every school district in America prior to the advent of legalized collective bargaining. These two organizations were the American Federation of Teachers, which was publicly and in all respects a labor union, and the National Education Association, which, although refusing to admit its union

status for many years, was a union in all other regards. Consequently, the unionization of public school teachers for collective bargaining purposes was a relatively simple task in comparison to the challenge faced by other unions seeking to organize other public employees, most of whom did not belong to any employee organization prior to collective bargaining. Despite that difference, however, one must note that for the period since the late 1960s, the national union most effective in organizing public employees other than teachers, i.e., the American Federation of State, County, and Municipal Employees, was the fastest growing union in the nation. This fact should clearly indicate that public employees represent a lucrative source of dues-paying membership for interested unions.

(b) Unions Follow Standard Organizing Methods

Once all of the selection factors have been considered by the union and a certain school district or municipality has been chosen to unionize, standard organizing methods are employed by the union. Those standard methods are:

(1) The organizing committee

One of the first steps in establishing a union is to form an organizing committee of interested employees. Quite frequently this committee is composed primarily of employees who have already demonstrated their discontent with the employer. From this cadre of committed malcontents, other sympathetic employees are identified in the work sites of the employer. Step by step, this process is repeated until a sufficient number of union members exist to call for a representation election. In almost all such instances the union will not seek a representation election until it is very confident that it can win.

And, it must be stated here that in most such cases familiar to the author the union has won the election.

The organizing committee always works closely with the parent union under the guidance of a trained union employee. This provides the committee with the necessary expertise to carry out its functions of affiliation, recruitment, organizing, and electioneering.

(2) Key troublemakers

In many employment situations, there is often a few employees who are viewed by the employer as "troublemakers." As public employees, such persons are sometimes difficult to dismiss, particularly if they are involved in union membership activities and have the backing of the union. Any attempt to dismiss such employees creates instant martyrs, invites First Amendment suits, and polarizes the other employees. These "troublemakers" are of special interest to the union because these employees will take risks that other employees will not venture and thus provide the union with a chance to set up some dramatic confrontation designed to divide the employees from the employer. When such a division occurs, the employees are likely to transfer their loyalty to the union.

(3) Confrontations

In essence, labor unionization is a test of who shall control the workforce--the employer or the union. The control of the workforce goes to that body which has the loyalty of the workers, and in order to capture that loyalty, the union must polarize rank and file employees. The polarization of the employees is dependent upon making them believe that the employer is their enemy by dramatizing disputes between employees and the employer, particularly those disputes where the

employer can be made to appear to be in the wrong. Although such disputes are often ready-made, the author has experienced a number of cases where the union created a situation where confrontation was unavoidable in an effort to alienate the employees from their employer.

In one such situation, where a union was attempting to organize the employees, the union was informed that it could not appear on the employer's property, but that the union was permitted to meet with employees elsewhere. The union agreed and appeared in a few days on public property adjacent to a large employee parking lot. Gradually, the union moved onto the fringe of the parking lot near the exit. The union was asked to remove itself from the employer's property. The union refused to vacate and a confrontation ensued in view of a large number of employees. In that particular case, the union obtained free publicity (the news media had been previously contacted by the union) and demonstrated its availability to represent the employees.

(4) General infiltration

The ability of a union to represent its members is enhanced if it possesses much information regarding the operations of the employer. For example, by collecting the following information, the union develops a valuable storehouse of information which enables it to operate more effectively:

A copy of all written agency policies

A copy of all agency regulations

Copies of all job descriptions

A copy of the job classification system

Minutes of the meetings of the governing body

Special reports and documents relating to working conditions

Copies of intra-agency memoranda and correspondence

General "confidential" management information

A list of the salary of each employee

A copy of the salary program

The possession of such information gives the union insight into the operations of the employer, allowing more effective bargaining proposals to be made and providing more opportunity to lodge grievances on the basis of inequitable application of the agency's governing rules.

By having loyal union members in strategic locations, such as the business office, the payroll office, the personnel department, etc., the union is able to obtain information which would not otherwise be available to it and thereby strengthen its leverage relationship with management. For example, "confidential" information that certain employees were being favored in the application of the salary grid would give the union a definite advantage in its relationship with management.

3. Why resist unionization

If two companies (or two government agencies) could be found which were identical in all respects, except that one had become unionized, a comparison of the two likely would show these basic differences:

. The unionized agency probably would have lost some of its management powers;

. The unionized agency probably would be paying more wages and benefits for the same number of employees;

. The overall productivity and the cost/benefit ratio of the unionized agency likely would be lower.

Naturally, the above observations are from a management point of view. Observing from a labor point of view, one might say that the unionized agency is better off because the employees are paid better and have improved working conditions; however, there is no guarantee that unionization automatically results in better wages and working conditions. But even where unionization does bring higher wages and "better working conditions" (i.e., less work?), such improvements are at the expense of the consumer, or the taxpayer, in the case of public service. Unless the unionized agency improves the cost/benefit ratio of the agency, all improvements in wages and benefits are at somebody else's expense.

As a general rule, then, unionization means that a given amount of work becomes more expensive, or even worse, a given amount of work decreases while its cost increases. This ultimate result of unionization is brought about by a number of fundamental developments in the bargaining process:

(a) Wage Increases

When unions become engaged in labor negotiations, they make a host of wage demands designed to give employees salary increases which they would not receive were it not for the union. Such demands sometimes appear to come from an inexhaustible source, and include, but are not limited to: cost of living increases, super maximum salaries, more frequent step increases, exotic overtime pay, special seniority pay, super pay for holiday work and weekend work, shift differentials, pay for accumulated sick leave, extra-duty pay, hazard pay, call-back

pay, portal-to-portal pay, severance pay, union activities pay, etc. With the passage of time, management is bound to agree to some of these proposals, in order to maintain labor peace. And, each time that such a concession is made on the basis of fear of labor unrest, and each time that such a concession is made which cannot be justified in terms of improved productivity, the agency is inflating the cost of labor beyond that which would be the case in a free competitive market.

**(b) Compensable Benefits**

In addition to wage demands, unions routinely request improvements in compensable benefits. Generally speaking, compensable benefits are sometimes viewed by the employee to be as valuable or more valuable than a salary increase, since wage increases are taxable, and most compensable benefits (e.g., payment of hospitalization premium) are not taxable. Therefore, while a dollar in wage increase might be worth only 70¢, a dollar applied to a hospitalization premium is worth a full dollar in value.

Again, the list of imaginative demands for improvements in the compensable benefit package appears to be endless. Such demands include, but are not limited to: disability income insurance premiums, group life insurance premiums, tuition reimbursement, uniform allowances, mileage reimbursement, catastrophic hospitalization premiums, special pension benefits, credit union, employee discount privileges, parking facilities, payroll deductions, free physical examinations, cafeteria with reduced prices, use of agency automobile, access to medical center, etc.

Like unwarranted salary increases, unjustified improvements in the benefit program increase the cost of production at the expense of the taxpayer.

(c) Less Work

Not only is the union expected to make demands for improved wages and benefits, the union is expected to demand improvements at the work site, which usually means less work. Although such improvements are understandably to the liking of the employee, such improvements in the employees' working conditions seldom result in improved productivity. Although no list of demands for improved working conditions can be made, here is a brief example of such demands:

. Washup time on agency time
. Morning and afternoon rest breaks
. Special uniforms
. Special "safety" clothing
. Written and specific job descriptions
. An employee lounge
. Guarantees of job security
. Union bulletin boards
. Use of agency tools and equipment
. Noise abatement
. Availability of vending machines
. Use of agency lockers
. Protection from "excessive" supervision

(c) Loss of Management Rights

Management rights lost are usually labor's gain. In other words, the less management is able to direct the workforce, the more opportunity the union has to direct the workforce. Unless defended vigorously, management can gradually have its right to manage eroded. If an employer is to operate an efficient agency, it must retain its fundamental right (and obligation in the public service) to give directions and to enforce its directions. The fundamental rights of management includes the right to:

. Discipline and discharge employees

. Promote and demote employees

. Transfer employees

. Assign merit wages

. Assign overtime

. Schedule all agency operations

. Control production standards

. Make technological changes

. Contract out

. Approve leaves

. No labor strikes

. Cooperation from the union

In negotiating on any of the topics listed above, the management negotiator should be very careful not to enter into any agreements which infringe upon these important rights. For example, here are some contract provisions which would seriously undermine the basic management rights:

. The right for employees to take annual leave at their discretion

. The right to refuse overtime

. No involuntary transfers

. Promotion based upon seniority

. Prohibition against contracting out

4. **What are the tell-tale signs of unionization?**

From the mid-1960s until the present, public employees have been unionized with very little resistance from public employers--school districts, counties, municipalities, state agencies, and federal agencies. Although there are several major reasons that public employees do not seriously resist the unionization of their employees, none of those reasons are valid, in the opinion of the author. Public employers do not resist the unionization of their employees for several major reasons:

a. Governing bodies of school districts, municipalities, counties and state governments are political bodies; consequently, they hesitate to offend those large numbers of citizens who, although not union members, are nevertheless sympathetic to the labor movement. When faced with attempts by the union to organize their employers, these politician-managers, on the average, put up little resistance.

b. Many governing bodies and their executives seem to assume that all public employees want to unionize, and therefore conclude that resistance is futile, particularly if there is a state law that assures collective bargaining upon proper request of the employees.

c. Politician-managers have limited accountability for their actions. Most school board members and members of similar governing bodies are in office only for short periods of time. The worst that can happen to them is that they don't get reelected or reappointed. They have no investment in the agency and stand to lose little should they make decisions not in the best interest of the agency and the public it serves.

For those public employers, however, who are interested in avoiding unionization of their employees, one of the first requirements in the campaign to keep the union out is to be able to recognize the telltale signs of unionization. The most common signs are:

**(a) Undertones**

Although there is no consistent sequence of events as a union moves in on a public employer, often the first sign of unionization is the presence of rumors and a general undertone of discussion and behavior among the ranks of workers which indicates some employees are involved in matters which they will not openly reveal to management. Despite the fact that nonunion agencies often experience rumors that a union contract has been made, only to find that they were only rumors, each such rumor should be investigated by designated members of the management staff. Naturally, such investigation should be discreet; otherwise, the rumor is given additional credence.

**(b) Changes in Attitude**

Over a protracted period of time, management becomes accustomed to a general and consistent attitude among the employees at large. If there is active and prevalent consideration of unionization, perceptive managers (particularly those who are first-line supervisors) will detect

a change in attitude. This change in attitude is manifested by a number of phenomena. For example, groups of employees will be observed in private discussions which cease and break up upon the arrival of a supervisor. Or, certain employees who have always been open in their discussion with their supervisors become reticent. Sometimes the change in attitude can be detected at a departmental meeting, where the employees become sullen and unresponsive to the business of the meeting, or certain members of the group bait, question, or challenge the administrator in charge.

(c) Unauthorized Meetings

Another sign of unionization, usually infallible, is the holding of meetings for nonsupervisory personnel which were not called to the attention of management, and consequently, not approved or sanctioned by management. Such meetings are usually detected by management prior to the actual meeting date, and the business of such meetings is usually made known to management in various ways, usually by someone present who has reason to inform management. In some cases, the meetings are generally known in advance and the media is informed and invited. In those cases, the meeting is used for one of two reasons, or both. Either the employees simply want to use the meeting to organize a union, or the employees may also want to use the meeting as a "scare" tactic to encourage the employer to take some action favorable to the employees which the employer would not otherwise take. In any case, whenever employees hold unauthorized meetings to discuss anything related to their employment, management should view this as a serious indicator of unionization.

(d) Presence of Union Representatives

Any official contact with management from a union to discuss possible recognition is a certain telltale sign that the union has already made inroads into the ranks of employees. Such a development should be interpreted for what it is--that the union is ready to make its move to organize the employees. Although it may not be too late at this point to stop the union, this stage in the development is usually a sign that the union has achieved significant infiltration. The best solution to this development is to have taken previous counter measures which would have precluded the union from making such overtures. But, more about how to do this in another section. Until then, however, some brief advice is appropriate. Should a union present a representative of management with signed authorization cards from employees, these cards should not be accepted (particularly in instances where there is no applicable bargaining law) unless the cards are the result of a proper election procedure. Otherwise, the union should be told that the cards will not be accepted.

(e) Insubordination

As union developments progress and employees become more confident that they will be backed by the union in cases of dispute with the employer, incidences of insubordination often increase. Sometimes these incidences are spontaneous, while in some cases they have been planned as a tactic in the overall unionization strategy plan. In either case, a distinct increase in acts of insubordination should be viewed as another potential telltale sign of unionization. Accordingly, management should respond to the act of insubordination with care. Insubordination cannot be condoned, but at the same time, the response

of management should not give the union a tailor-made cause celebre to rally the troops. There is only one rule to follow in such cases of insubordination: Do not tolerate insubordination, but do not allow the response to be of benefit to the unionization effort.

(f) Absenteeism

In some cases of unionization, there is a detectable increase in employee absenteeism seemingly unrelated to the normal causes for absenteeism, but seemingly related to employee discontent. A number of studies have proven a correlation between job discontent and employee absenteeism. Where increased and excessive absenteeism is related to dissatisfaction with working conditions, there exists the potential for a union to move in. In the advanced stages of employee unrest and unionization, absenteeism may take place on premeditated concerted basis as a bargaining tactic to force the employer to stop some action unacceptable to the employees, or take some new action desired by the employees. In either case, all excessive absenteeism related to employee unrest should be responded to in a manner that will stop the excessive absenteeism, but also in a manner which will not play into the hands of the union.

(g) Provocations

Invariably, acts of provocation by either the employees or the union are certain telltale signs of serious unionization efforts. Acts of provocation are purposeful goading or pricking tactics employed by employees (or their union) designed to cause the employer to respond in a manner desired by the employee or the union. For example, in an instance personally familiar to the author, a group of picketers were parading in front of the main school board office. The union had been

informed that all picketing would have to take place off school property and not interfere with the rights of other citizens. The picketers gradually moved in to the entrance of the school board office and demanded to picket in the corridors of the board office. The one security guard refused them entrance as instructed, but the crowd of picketers moved bodily on the guard. In those close quarters, a picketer somehow ended up on the ground. She was pregnant, and claimed she was going to miscarry. She was taken to the hospital, but there was no miscarriage, and no sign of injury. The subsequent testimony produced only conflicting reports. The guard said he did nothing but stand in the doorway. The picketers said he knocked the pregnant lady down. However, one thing was certain. The press was present, and the headlines in the local paper read something to the effect: "School Board guard hospitalizes pregnant teacher." No one ever finally determined if the incident was provocation.

## V. AVOIDING UNIONS

As has been discussed elsewhere in this book, unions do not generally assist in the efficient and economical operation of a government agency. Therefore, unions should be avoided, but that is easier suggested than done. In many school districts, municipalities, and other governmental jurisdictions, remaining union-free can be a very serious challenge. This section will describe an overall plan for avoiding labor unions by discussing the basic rules for staying union-free which are:

- The agency must follow the sound fundamental principles of organization.
- The agency must be committed to the concept that unions are a hindrance to efficient and economical government service.
- The agency must be dedicated to dealing with its employees in an enlightened manner.
- The agency must be willing to confront the union in a showdown fight should such be necessary to stay union-free.
- The agency should know what it can do and can't do to resist the organization efforts of a union.

Each of these rules will be discussed in detail. *An important prerequisite to staying union-free is to create an organization structure based on sound organization principles.* These principles are:

1. The governing body should generally restrict its function to the review and adoption of policies, the review and approval of the agency budget, a general monitoring of agency activities, and the review

of appeals to administrative decisions. Conversely, a governing body should refrain from attempting to administer the agency. If a school board or municipal council devotes itself properly to matters of policy, budget, monitoring and appeals, there is little time left to perform any other task. By deviating from its proper role and attempting to involve itself in the administration of the agency, the governing body has taken a serious step to undermining the executive initiative of the agency. By weakening its own executive arm, the governing body correspondingly weakens its main defense against the union.

2. The chief executive and the management team should restrict themselves to the implementation of agency policies. By attempting to fabricate policy without the involvement or consent of the governing body, the management team contributes to the weakening of the governing body's power to govern the agency. Although such methods may be of advantage to a chief executive in the short run, such methods are not in the long range best interests of the management team, since an effective government agency requires that there be both a strong governing body and a strong management staff.

3. No function should be assigned to more than one unit. Each organizational component of an agency should be assigned clear tasks and, to the extent possible, these tasks should not be shared with other units of the organization. For example, the maintenance and repair of agency buildings should be assigned to only one unit; otherwise, duplication of effort, voids in maintenance, and conflicts between units likely will arise. Such poor organization diffuses management of the workforce and thereby contributes to an environment conducive to union organization.

4. Authority should be given to those who have the responsibility. Where politics are more important than economics, as is often the case in government service, there are occasions where some managers are assigned the responsibility for a task, but lack the authority to accomplish the task. For example, a school principal may be blamed for an unclean school building when in fact the custodians may not be under the direct or total control of the principal. Or the purchase of necessary cleaning supplies may be under the control of another office in the school district. If a principal is expected to keep the building clean, and if the building principal is to suffer the consequences of an untidy building, he must be given the necessary authority to choose the custodial staff, to direct its work, and to purchase supplies and equipment needed to keep the building clean. Unfortunately, the nature of government enterprise is such that responsibility is easily assigned, but authority is dispensed reluctantly.

5. Channels of command should be clear and adhered to. Legislatures legislate, governors govern, executives execute, administrators administer, supervisors supervise, and workers work--and never should their roles mix. Furthermore, the authority lines between these various components should be very clear. Everyone should know to whom he reports and that relationship should be adhered to strictly. For example, school boards should not attempt to deal directly and personally with members of the management team, thus bypassing the superintendent of schools. Conversely, members of the management team should not deal directly and personally with members of the governing body. And, within the workforce the command relationships must be clear to all employees, rank and file, as well as management. After

many years of supervisory and administrative responsibilities, the author can cite dozens of cases where channels of command were unclear or were not adhered to, in either case causing unnecessary inefficiencies in operations. If a department chief has seven persons reporting to him, then the department chief should deal only with those seven persons, and he should refrain from dealing directly with those on a lower echelon. Conversely, the employees under the seven supervisors should not attempt to bypass their supervisor by dealing directly with the department chief. Failure to follow a clear and workable channel of command inhibits the decision-making process and thus weakens the agency's ability to resist attempts by the union to organize the employees.

To the extent possible, the channel of command should allow for only one boss for each employee. Where organizations allow many employees to be directed by more than one supervisor there is inevitable conflict between the supervisors involved, confusion among the employees involved, and a general diminution in overall efficiency. Furthermore, such lack of organization allows employees to "whipsaw" their supervisors by playing one against the other, enabling some employees to escape needed supervision. And whenever employees are not supervised there is greater opportunity for mischief.

6. The organizational structure should be consistent throughout. To the extent possible, all government agencies should have an organizational structure which is based upon sound principles of operational management. This structure should be capable of being clearly depicted by use of an organizational chart. All functions of the agency should be accounted for clearly in the organizational structure and the channel

of command should be obvious. The interrelationships of the various functions should be structured to assure maximum efficiency of operations. Titles of functionaries should be consistent. For example, in the case of a school district, the titles "Associate Superintendent," "Assistant Superintendent," "Director of _____," "Supervisor of _____," "Coordinator of _____," etc. should all indicate their relative position in the agency organization. For example, if a "Director of Finance" reports directly to the "Associate Superintendent for Management," then the "Director of Curriculum" should report to the "Associate Superintendent for Instruction." Furthermore, in this hypothetical example, both directors should have a similar job classification and similar salaries. In other words, position titles should indicate clearly in each instance that position's place in the organizational structure.

7. A manager should have a proper number of persons reporting to him. Although there is no absolute rule that applies in all situations, generally speaking, a manager should have about seven persons reporting directly to him. Naturally, this general rule may vary in exceptional situations, the point is that a manager's scope of control should be manageable. Anything else creates the potential for a breakdown in the management control system. Of course, too few persons reporting to one manager should be avoided, since such a practice results in understandable inefficiency.

## A. Labor Unions Do Not Generally Contribute to Improved Governmental Service

As discussed elsewhere in this book, collective bargaining is not designed as a management tool for the improvement of productivity. Collective bargaining is a procedure brought about by a political process based upon the premise that workers must be given special clout under power of law to use their collective force to gain more benefits and improved working conditions. Also, as explained elsewhere in this book, the salaries of employees can be improved in two ways:

a. The employees can improve their productivity and share in the savings, or

b. The employees can use their collective clout to intimidate the employer into paying higher wages, by passing the cost of such wages on to the customer, or the taxpayer, in the case of public services. In this later case, the union and its members do not earn their raises; they simply transfer money from unorganized workers to organized workers.

Given two similar government agencies, one being unionized and the other not unionized, it is likely that the unionized agency will differ from the nonunionized agency in the following general ways:

a. The unionized agency will produce less work per employee.

b. The unionized agency will pay its employees more, but at the expense of the unorganized taxpayer.

c. The unionized agency will have weaker management control, resulting in less efficient operation.

d. The unionized agency will have more discontent in the workplace.

Politicians and bureaucrats who seem convinced that unions are so good should answer these questions:

a. Why do only 20 percent of all eligible workers in America belong to a labor union?

b. Why has this percentage not changed significantly after a half century of union effort under the full protection of federal and state laws?

The answer is that *labor unions are not productive in American society as now structured.* True, in the short run labor unions are good for some unionized workers at the expense of nonunionized workers, but in the long run, even the unionized workers do not generally win. Under different conditions labor unions could make a contribution to productivity, but those conditions are not likely to come about in the near future.

Those conditions under which labor unions would be more likely to be productive are:

a. All collective bargaining would be by mutual agreement of the employer and the employee. Such an agreement based upon voluntarism would provide the basis for cooperation rather than antagonism.

b. There would be no exclusive representation. Without exclusive representation all employees would be free to deal with their employer on a voluntary basis.

c. The union would devote itself to finding ways to increase productivity with the understanding that its members would share in the savings. This type of cooperation would result in more efficient and effective services to taxpayers.

In summary, part of the strategy for success in avoiding unions is to understand that unions are not likely to help the government agency to be more productive or more responsive to the taxpayers. Nor is unionization any assurance that the employees themselves will be better off.

1. Large bureaucracies tend to encourage labor unions

Whether in the public sector or the private sector, the size of the government agency or the private company can affect the likelihood of unionization. Although there is no absolute correlation between unionization of employees and the size of the agency, there is a general relationship. On the average, large American industries are more likely to be unionized than small businesses. The same general rule applies to government agencies. True, many small local governments and school districts are unionized; however, the likelihood of unionization and the intensity of unionization is greater among larger districts.

Although the reasons for unionization of employees vary from company to company and government agency to government agency, all large government and commercial operations share the same risk as they grow large, that is that the *employees will become alienated from the employer and its management force.* As employees become increasingly distant from their employer, the more likely will their loyalties shift to a union. The implication of this phenomenon is clear. Large companies and government agencies should extend special effort to help employees understand that their own interests can best be served by cooperation with the employer. The strategies for achieving such a

cooperative relationship is the subject for another book, cannot be dealt with in this presentation.

2. **Where the salaries of unionized employees are higher than the prevailing wage, the difference is at the expense of the unemployed, or at the expense of the quantity and quality of services rendered by these unionized employees**

In order to pay for concessions at the bargaining table, the employer must either:

a. Increase the price of the commodity to the consumer, or increase taxes on the taxpayer, in the case of government services.

b. Lower the quality and/or quantity of the commodity being sold, or the service being rendered in the case of government.

In the process of making concessions to the union, especially in the areas of compensation, salary increases are provided by not employing additional personnel who otherwise would be employed. Consequently, those who participate in making salary concessions beyond the prevailing rates should recognize that they are able to do so only by keeping others unemployed, or keeping nonunion workers at a rate lower than the prevailing rate. The point here is that most union demands are at the expense of other workers both in their role as workers and consumers.

3. **What's best for the union is what counts!**

Not all union demands are designed to help its union members. Not only does the union represent employees, it represents itself as well. As a matter of fact, all other relevant factors being equal, given a

choice between a concession of value to the employees and a concession of value to the union, the union will most often take the union benefit. This is true, because unions take on a life of their own, separate from that of their members. Union functionaries and the union bureaucracy have their own needs which can be met only by concessions from the employer. For example, a union can meet on company time (a high priority of most unions) only if the company (or government agency) agrees. As a result, the collective bargaining process not only supports the welfare of employees, but the welfare of a whole union bureaucracy as well.

#### 4. Union membership is often based upon fear

Although most Americans dispose of their incomes as they freely choose to, union dues are too often extracted under fear. In too many instances, employees who choose not to join the union are subjected to a variety of threats and other acts designed to force the employee to take an action which he would not otherwise take. Such acts range from mere snubbing to job loss and physical harm. Unfortunately in such cases, little can be done by the individual or his employer, and little will be done by government authorities to stop such actions.

### B. The Agency Must be Dedicated to Dealing With Its Employees in an Enlightened Manner

Nonunion status must be earned. A salary creates only one right for the employer--the right to an acceptable day's work--nothing more. Any other right must be earned by the employer by actions beyond the minimum requirement of management. The author was an active consultant during the mid-1960s and traveled throughout the United States during

that period when collective bargaining was entering the public service. On dozens of occasions, employers were heard to say that unionization was no problem because "our employees are loyal to us." It was partially the result of this misguided attitude that hundreds of school districts, municipalities, state agencies, and federal agencies were unionized unnecessarily. In most of these cases the employer overestimated the loyalty of the employees and underestimated the ability of the union.

For those public employers who wish to avoid unionization of their employees, there are several threshold requirements:

a. <u>There must be a funding commitment</u>. If the union is to be kept out, the agency must be willing to pay for that luxury, by providing comparable wages, benefits, and working conditions. Some employers have rebutted the author by stating: "If I must pay union wages, what advantage is it to be union free?" This question is always asked by a person who has never had to manage a unionized agency. Anyone who has managed such an agency knows that unionization brings many additional obstacles to efficient management

b. <u>The employer must know the law with regard to labor relations</u>. Whether an employer is in a state with a bargaining law or without a bargaining law, there are certain actions which may be taken and which may not be taken with regard to the treatment of employees. Before undertaking any anti-union campaign, the employer should seek legal and consultant help in order to avoid unnecessary conflict.

c. The employer must make a commitment to stay union-free. If the governing body of a governmental jurisdiction is not united in its position to operate without the presence of a labor union, it is likely that the union will be able to organize the employees, because without the help of the employer, many employees cannot resist the pressures generated by the union.

Once these threshold commitments have been made, the employer is ready to embark upon a program of enlightened management in an effort to remain union-free. Here are some specific suggestions to help such employers *before the union knocks:*

1. **Give employees a role in the management of the agency**

If employees are involved in management decisions, there is less chance that they will be critical of management decisions. Even when some employees have not been personally involved in management decisions, they are aware that some of their colleagues have been involved. This gives the employees a sense of confidence that the views of employees were considered before management decisions are made. There are many ways to involve employees in management affairs, the traditional technique being to use elected councils of representative employees. But formal provisions are not the entire answer to involving rank and file employees in managerial considerations. No supervisor needs an employee council to discuss informally with his staff the best way to go about solving a problem. This technique is employed by all good supervisors, irrespective of union considerations.

2. Hire employee leaders as members of the management team

Many employees who come forward as leaders among the workers are likely candidates for management positions, not only because they have demonstrated their leadership potential under their own initiative, but such persons also carry with them the support of many of those employees with whom they previously worked. In some cases, an employee who is actually agitating for a union can be promoted, thus depriving the union of valuable leadership. In a number of cases these types of persons turn out to be very good managers, partially because they understand unions and how they operate.

3. Strengthen two-way communications

An efficient government operations not only has clear channels of communications from the bosses to the employees, but also clear channels of communications from the employees to the bosses. Such two-way communications make it more likely that problems will be discovered, which otherwise might not be, and that employees have a chance to make their worthwhile suggestions for better ways to operate the agency. But again, no formal system need be set up to do this if each supervisor understands that he can function more effectively if he is receptive to the views of his employees.

4. Educate the employees about the agency

Two men were observed digging two separate ditches. The first digger was digging in a slow and careless manner. The second digger was digging with care and commitment. The first digger was asked: "Why are you digging that ditch?" The first digger responded: "Damned if I know!"

The second digger was asked: "Why are you digging that ditch?" The second digger responded: "Because I am preparing the ground for the foundation of a beautiful cathedral."

5. Provide appropriate rewards

More and better work can be obtained by employees by giving them rewards than by giving them threats. A reward entices an employee to work in a positive frame of mind. A threat will cause an employee to be negative and to seek out ways to undermine the employer. Consequently, an enlightened employer should make a list of all of the ways that employees can be rewarded for work beyond the call of duty. Such rewards can include promotions, merit pay increases, bonuses, special compensatory benefits, time off with pay, special training opportunities, public recognition, presentation of awards, etc. The list can be extended endlessly. But keep in mind that the daily recognition given by a supervisor to employees who do well is just as important as the formal presentation of a certificate of merit.

6. Give publicity to the activities of employees

Most employees take pride in their work and appreciate recognition for the work they do. News coverage in the local media and articles in the agency newsletter contribute significantly to a feeling among employees that their work is recognized and valued.

7. Provide a complaint procedure

There is no place of work where employees never have a complaint. A complaint by an employee is a statement of discontent with something about his work or an allegation that the agency is doing something

wrong. In either case, whether valid or not, such complaints should be heard with interest and objectivity. Where a labor contract exists most complaints, usually referred to as grievances, are reviewed by a grievance procedure contained in the labor contract. But where no labor contract exists, there should be a formal complaint procedure for those concerns which are not resolved informally at the first-line supervisory level. The complaint procedure should assure that the complainant is protected in his right to process a complaint and that just awaits at the end of the complaint procedure.

8. **Establish employee councils**

Employee councils have a definite place in most government agencies. Such councils should be elected by employees, and the council should elect its own officers. Under ideal conditions, the council should meet with the chief administrative officer (School Superintendent, City Manager, etc.) on a regular basis. The council chairman should conduct the meeting and the chief executive should be a guest to listen to discussions and answer questions when necessary.

The author has had considerable experience in establishing such councils and has found that they have numerous advantages:

a. Employee councils enhance the two-way communications referred to earlier.

b. These councils provide a sounding board for the chief executive, allowing him to discuss proposed actions before a commitment is made.

c. The council provides an outlet for employee concerns which require attention.

d. Employee councils proved an additional means by which the chief executive can monitor the actions of his own management staff.

In large government agencies one employee council is often not enough and councils can be organized on the basis of job groups. For example, office employees, bus drivers, custodial personnel, etc. could elect their own councils. In such cases, it might be difficult for the chief executive to meet with all such councils at every meeting, but in such large agencies the chief executive usually has a number of assistants who can represent him. But even when not present, the chief executive should keep in close touch with the activities of these councils.

9. Kill rumors quickly

In any work place where employees can communicate there are rumors which circulate from time to time, rumors that the agency is going to have a reduction-in-force, rumors that the chief executive is soon to be fired, rumors that there is no money left in the treasury to pay employees, and so on. All such rumors need to be investigated promptly and if untrue so stated for all employees to hear. Where such rumors are based upon fact, but fact that cannot be discussed, then the agency has no choice but to admit to their accuracy or take a "no comment" position. Again, a working two-way communications system does much to impede the circulation of unfounded rumors.

10. Provide exit interviews

Many employees have knowledge about agency activities which could be improved, but are hesitant to complain or offer suggestions for fear of retaliation. Certainly, any agency where employees are afraid to

complain has a serious problem. In such an agency a confidential exit interview can reveal many management problems which might not otherwise be known to management. For the employee who has submitted his resignation and who is secure in the knowledge that the interview will be confidential, the exit interview can provide stark insight into agency operation. Although no one interview by itself will tell all, the results of numerous interviews can indicate general as well as specific problem areas in the agency.

11. Provide competitive wages, benefits, and working conditions

Where employees are paid less than employees in comparable positions with neighboring employers, there is likely to be a cause for complaint. However, if these same employees should be paid wages and benefits comparable to their counterparts in other agencies, there is less likelihood that they will feel mistreated. Granted competitive wages, benefits, and working conditions are no guarantee that employees will not join a union, but there is no single better way to discourage the formation of a union. Although some employers would argue that if you must pay union wages, you may as well have a union. The logic of that view will be left with the reader to ponder.

12. Prepare a brochure on agency employee benefits and working conditions

Employees often do not recognize the benefits that they receive from their employer. Sometimes these benefits become taken for granted. One way to remind employees of their benefits beyond wages is to prepare an agency brochure which describes the total benefit package for employees. When hospitalization, life insurance, retirement, annual

leave, sick leave, rest periods, reduced lunch prices, free parking, tuition reimbursement, etc. are added together they often make a total package quite impressive to the average employee. Incidentally, this brochure can be used in interviewing applicants and for promotion in the recruitment of new employees.

13. Get rid of troublemakers

To some degree every employer has experienced at some time the presence of an employee or employees who seem determined to undermine the integrity of the agency. These employees usually reveal themselves by their statements and actions. When confronted with employees whose actions are not motivated by the best interest for the agency, but who obviously are embarked on an adversary path, the employer should take swift steps to remove such persons from employment, if there is reasonable hope that dismissal actions will succeed. If dismissal is not a reasonable alternative, then other personnel actions should be taken to isolate the troublemakers so that their influence is minimized.

14. Set up a recreation program

No matter where people work there are many among them who like to participate with others in recreational activities. For many employees the only chance to make friends and socialize is through contacts on the job. The employer can take advantage of this need by providing an organized recreation program. Athletic teams, bridge clubs, bowling leagues, nature groups, etc. all contribute to an esprit de corps among employees. For agencies which can afford it, free instruction in recreational activities can be a real morale booster for employees. Where possible, members of the management team should be seen at least

occasionally mixing with rank and file employees in these recreational activities. Such contacts between employees and their supervisors off the job make for a better human relationship on the job.

15. Apply all work regulations consistently

One of the main sources of grievances from employees is found in the inconsistent application of work rules and personnel regulations to employees. Although some work rules may not be popular among employees (e.g., rigid punctuality requirements), these rules can somehow be endured if they are applied equally to all employees. When these rules are applied differently to different employees on the basis of friendship or on the basis of whim, an immediate sense of injustice is felt by those who are treated strictly according to the work rule. Therefore, it is imperative that top management undertake a program of in-service to train all supervisors in the proper way to apply personnel regulations and on-site work rules; otherwise, inconsistencies will emerge, creating a serious morale problem among employees.

16. Distribute an agency newsletter

Employees like to know what happenings are taking place at their place of employment, and one of the best ways to keep employees informed of such happenings is to publish an agency newsletter. Such a newsletter should devote considerable space to the activities of rank and file employees. Seeing one's picture in a company newsletter, accompanied by an article describing one's work gives the employee a great sense of importance. Over a period of a few years, practically all groups of employees can be recognized. The author has had a number of experiences where the employees themselves assisted in the

preparation of the newsletter. This particular technique is highly advisable, since such involvement by the employees themselves enhances the credibility of the newsletter.

17. Take swift action against incompetence

Most employees want to take pride in their work. They want to feel that their work must achieve high standards, and most employees resent those among them who malinger. Management should support this positive attitude among employees by removing from employment those who, after reasonable assistance from management, fail to perform in an acceptable manner. Naturally, dismissal of an employee for incompetence should be only after assistance and counseling has been offered; otherwise, other employees may learn to view the employer as uncaring employers. Depriving one of his job can be a form of capital punishment in the workplace, so all dismissals due to unsatisfactory job performance should be dealt with as a serious matter for both the employer and the employee.

18. Know the trouble spots

At any given time most employers experience some special difficulty with one or more phases of the agency's operation. One time it may be accounts receivable; other times it may be budget preparation. Whatever the case, top management should be aware of all trouble spots and move quickly and decisively to correct all such problems. Such initiative not only heads off more serious problems, but conveys to the employees that high standards are expected by all offices and all employees, managers included.

19. **Review agency regulations**

Even though an agency may have a continuous procedure for review of its policies, regulations, and workrules, periodically the agency should review its governing documents in total. The author can think of no more important action to take to assure that an organization is run along businesslike lines. Well-written policies and regulations can be a fortress from which to head off a union or to negotiate with a union should one become organized. The task of rewriting policies and regulations is not an easy one. It is time consuming and frustrating because of the complex nature of government service. Many agencies find the assistance of an outside expert to be indispensable in the review and revision of agency policies and regulations. Such an outside expert can often provide just the crystallizing force needed by the chief executive to get the job done. Special attention should be given to those policies and regulations which govern the workforce.

20. **Provide educational opportunities for employees**

Most employees have some ambition to improve themselves on the job, if for no other reason than to make their job easier. An enlightened employer will take advantage of this positive attitude among employees and offer educational programs designed to improve performance on the job as well as to provide for personal growth of the employees. Courses in writing skills, computer literacy, word processing, stress management, health care, speed reading, and other similar job related courses, improve the employee's worth as a person while providing the employer with a more competent employee. There is probably no better investment dollar for dollar an employer can make than to invest time

and money in a well-developed education program. To the extent possible, such a program should be offered partially on company time and the course offered should be the result of suggestions by the employees themselves. In many cases the price of the course can be minimized by using other employees as instructors and using agency premises for classrooms.

21. **Prepare a job description for all positions**

Every employee should have in his possession a complete and up-to-date written job description. Such written job descriptions form the basis for a job classification system as well as the primary direction for what tasks must be performed on a given job. The absence of job descriptions leaves the employee and his supervisor free to operate in a manner which may not be to the optimum best interest of the agency. To avoid having job descriptions which stultify employee performance, there should be a routine procedure for updating all job descriptions immediately upon the rise of the need to do so.

22. **Establish a sound job classification system**

Although many public employees may feel that they are underpaid and would like to receive higher salaries, they are far more accepting of their salaries if they recognize that there is internal consistency in the salary structure, that is, that the salary assigned to each position is fairly related to other positions. Employees are understandably upset when they see persons in other positions with salaries unjustifiably higher than their own. A sound job classification system is an imperative and integral part of any thorough personnel program,

and they are not easy to develop properly. Therefore, a government agency is advised to seek expert consultant assistance in developing its job classification system.

23. Involve employees in recruitment

Many school districts, municipalities, and other government agencies find that they must go out and seek candidates to fill their employment needs. There are occasions when management should consider using rank and file employees in the process of seeking and selecting new employees. Although a trained recruiter is indispensable in seeking out new employees, employees from the agency can make valuable contributions to the recruitment and selection process. For example, applicants often relate more comfortably with nonmanagement personnel than they do with management personnel, thus allowing the true nature of the applicant to be observed. Additionally, the use of employees in recruitment and selection conveys to all employees that management values the opinions of its employees when it comes to hiring new employees.

## C. Suggestions for Resisting the Union

Should all efforts to operate the government agency along lines of enlightened management fail to discourage unionization of the employees, the employer may be forced to *take direct steps against the union.* Management should seize the initiative when it is apparent that the possibility of a union is serious. Management should not take a neutral position while the union takes the offensive; but rather, the employer should embark upon an aggressive campaign which does not underestimate the power and the determination of the union to win. Management should assume that the union will use every technique, every trick, every

maneuver which its experts have learned after years of experience. The employer should not be shocked by lies, distortions, set-ups, threats, and any other similar unethical behavior (even illegal) which is necessary for the union to gain recognition. To counter these efforts here are some specific tactical suggestions.

1. Form an anti-union task force

The first step to be taken to thwart the union is to select a small cadre of loyal top administrators to serve on a special task force to develop overall strategy to combat the union. This group should be appointed by the chief executive, except for one member of the governing body, who should be appointed by the governing body to act as a liaison between the task force and the governing body. This liaison person and the chief executive should give regular reports to the governing body in executive session when possible. Where executive sessions are not possible, a report can be given privately over the telephone to each member of the governing body.

2. Role play

Role playing is a technique of proven value in labor relations. The task force should ask a small committee of loyal managers to pretend to be union organizers and to meet as long as necessary and to conduct whatever research is necessary to prepare what the committee believes to be a comprehensive strategy which the union will use to organize the employees. This strategy plan should represent the most extreme scenario that the committee can reasonably conjure and should include a list of specific tactics which are anticipated to be used by the union. When the committee has completed its work it should meet

with the task force and the chief executive and present its findings. Some of the tactics which the committee is likely to put on the list have been discussed in another section in this book.

3. Retain a consultant

An employer usually faces a union organizational drive only once in its lifetime, and therefore most employers have little experience in such matters. However, there are a number of very competent and experienced expert consultants in the field who have been through numerous union organization campaigns. These persons have accumulated knowledge, experience, and skills which cannot be matched by the typical management staff in the typical governmental jurisdiction. Such persons should be sought out immediately and retained for whatever amount of time is necessary. This action will be the wisest expenditure of funds that the employer will make in its anti-union campaign.

4. Obtain legal advice

Although some consultants who are not attorneys know more about public sector labor law than some attorneys, legal assistance should be sought nevertheless. A word of caution, however. The attorney should be retained to give legal advice and not to suggest strategies and tactics, which is the function of the task force and the consultant. The attorney's role is to help identify legal questions and answer legal questions. Furthermore, the goal of the attorney should be to keep the issue between the employer and the union and *out of court*. These firm understandings should be entered into at the outset; otherwise, the anti-union campaign quickly becomes a legal battle, with suits and countersuits (accompanied by huge legal fees), which often end up with the union still knocking at the employer's door.

5. Form an anti-union committee of employees

In any employment place there are employees who are strongly opposed to labor unions. With encouragement these employees will volunteer to serve on a special committee to work with the task force in developing and carrying out a plan to repel the union. The role of this committee is very important, in that these employees come directly out of the workplace where they have direct contact with other employees on a daily basis. This special committee functions by:

a. Observing union activities in the workplace and reporting such observations to the task force.

b. Encouraging other employees not to join the union.

c. Reporting all acts of harassment, threats, or violence.

d. Appearing at union meetings to present an opposing point of view.

e. Presenting reports at employee meetings called by management to give reports on why employees are better off without a union.

6. Don't accept union cards

Quite often a union will arrange for employees to sign "authorization" cards and then present these cards to management as an expression of the wishes of the employees to be represented by the union, *without an appropriate representation election having been held*. As a matter of fact, most of the local teacher unions in America today never went through a representation election. They simply gave their school boards a list of members and asked to be recognized. This means of recognition is not advisable. Whenever a union presents authorization cards to the

employer, they should be abruptly rejected, unless they are valid documents from a proper representation election, which is most unlikely. These cards are usually the result of skillful sales pitches by the union and the employees often sign them not fully understanding what these cards mean.

7. Dispel fear of the union

Many employees are understandably fearful of unions because of the many stories they have heard of trouble whenever a union attempts to organize an employer. No caring employer should allow its employees to experience fear on the job. Furthermore, no employer should be so lax in its supervision as to allow diligent workers to be approached on the job by persons who wish to organize a union. Company time is for the conduct of company business, and each employee should be protected in his right to perform his job free of fear and interference from the union. Where such interference is persistent and the perpetrators can be identified, swift corrective action should be taken.

8. Inform employees of their rights

Many employees are not only totally ignorant of their rights on the job but are often misled by the union as to their rights on the job. Because of this general lack of knowledge of their rights, some employees are easily duped into joining the union because the employer has never informed them of their rights. When the union is trying to organize employees, the employer should inform the employees that:

a. No employee is required to sign anything presented by the union.

b. No union can guarantee higher wages, better benefits, or better working conditions without the agreement of the employer.

c. No employee is required to talk to anybody (including management) about unionization.

d. All acts of harassment, intimidation, threats, violence, and sabotage are to be reported to management immediately.

e. If a strike occurs, management will take the strongest action possible against striking employees and their union, including the possibility of dismissal of guilty employees and a law suit against the union for damages.

**9. Restrict the union's freedom to communicate**

Although government property is public property, most government agencies have the right to exclude activities which interfere with the legitimate functions of the agency. Unauthorized distribution materials is one type of activity which government agencies should review. Some of the ways to reduce unauthorized communications are:

**(a) Prohibit the Use of the Agency Mail Services**

Many government agencies have their own internal mail service which is used for official agency business. In some cases this mail service is administered rather loosely, allowing questionable materials to be distributed. Such mail service is for legitimate agency business and it should not be used for persons or organizations who have their own interests in mind. By restricting the mail service to only official business, the union is automatically excluded. As a consequence, the union is forced to communicate by other more inconvenient and expensive means. Since the use of the agency mail service by the union may be illegal, legal advice should be sought on this matter.

(b) Establish a No Trespassing Rule

A place of work is a place for work. Any activity not legitimately related to agency work should be excluded. Among other things, this means visitors on the job (e.g., union representatives) should not be allowed on agency property without prior specific authorization by management. Even if there is a legal requirement to admit union officials and other "out siders" to agency property, management still has the right to know who is on the property and what their business is.

(c) Establish a No Loitering Rule

Often unions are allowed to form because employees (and "outsiders") are allowed to cluster and congregate on agency property either during or after work hours. Generally speaking, government agencies have the right (and obligation) to curtail loitering, whether the loiterers are employees or nonemployees. By prohibiting loitering, management minimizes the opportunity for union sympathizers to meet on agency property, thus depriving the union of a convenient place to contact employees.

(d) Establish a No Distribution Rule

Along with restricting the use of agency mail service and mail boxes, the employer should also consider prohibiting the circulation on agency properties of all material, written or unwritten, which do not have prior and specific approval. Such a rule would automatically exclude union propaganda.

(e) Control the Use of Bulletin Boards

Most employers have bulletin boards located at various work sites to post information as one means of keeping employees apprised of matters related to their jobs. The only materials which should appear

on those bulletin boards are those which carry the official seal of approval by management. Any other material should be promptly removed.

10. Give out no names

Surprisingly, a number of unions have been helped in their organizational efforts by using a list of employees supplied by the employer. Little more needs to be said about this ill-advised practice, since the confidentiality of employees' names and addresses is protected by law. Consequently, no such information should be given to the union.

11. Avoid polarizing incidents

As discussed elsewhere in this book, unions will often try to create an incident of confrontation between the employer and the employees (or the union), in an attempt to dupe the employer into making an error or into appearing foolish in the eyes of the employees. Therefore, the task force should be on the constant alert for those instances where a disagreement might escalate into a full-blown confrontation with the union.

12. Prepare a strike plan

During the early years of unionization in industry, the vast majority of strikes were over the failure of the employer to recognize the union. Although not to the same degree as was the case in the private sector, there have been and will continue to be some strikes by public employees whose employer refuses to recognize their union. Therefore, whenever a union is attempting to organize a public employer, the public employer should develop a strike plan. Such a plan has several advantages:

a. A strike plan provides a strategy to weather a strike; therefore, the use of fear of a strike is thereby substantially reduced and management can act with a more secure sense of confidence in its conflict with the union.

b. A strike plan provides a strategy to keep the agency operating during the strike, thus emasculating the union's main weapon--its ability to close down the agency.

c. The presence of a strike plan clearly signals the union that the employer will not be intimidated, thus depriving the union of another of its primary weapons--the ability to frighten the employer into taking actions which would not be taken under normal conditions.

For more information on strikes by public employees, the reader should consult one of the author's books on this topic.

### D. If There is to be an Election, What Can You Do, and What Can't You Do?

Once unionization efforts have been so successful that a representation election has been called for, the struggle is not necessarily lost for those employers who wish to wage a nonunion campaign. However, in those states where there are bargaining laws (and in most federal agencies), there are certain acts which employers and unions may not engage in. These prohibited acts are commonly referred to as "unfair labor practices." Naturally, where the employer has agreed to a representation election in those states where there is no bargaining law, anti-union efforts by the employer likely would be less restrictive.

The remainder of this section will discuss briefly unfair labor practices. Since the determination of what is an unfair labor practice

is a quasi-legal matter and varies from state to state, advice in this section is not intended to be legal advice and should not be used as legal advice. Those needing legal advice on unfair labor practices should consult with a qualified attorney.

In a recent case in Rhode Island, the state's Labor Relations Board ruled that the University of Rhode Island changed pay grades, positions, and titles of some university employees without negotiating with the collective bargaining representatives.[1] This ruling was just one of hundreds of similar rulings on charges of unfair labor practices (ULP) rendered by state labor boards throughout the nation.

What is an unfair labor practice? Although what constitutes an unfair labor practice varies from state to state (and under Federal Executive Order 11491), generally speaking, a charge of unfair labor practice is an allegation by either management or the union that the other has failed to follow the requirements of the applicable bargaining law with regard to required bargaining procedures.

For the most part, all public sector bargaining laws assure public employees certain substantive protections, which are:

. Public employees have the right to organize;

. Management may not dominate, support, or otherwise interfere with the internal affairs of the union; and

. The employer may not refuse to bargain.

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[1]Rhode Island State Labor Relations Board and State of Rhode Island, University of Rhode Island, Rhode Island State Labor Relations Board, Case No. ULP-3538, October 16, 1980.

Some state bargaining laws make no specific reference to ULPs, while others specify what acts of commission or omission constitute ULPs. Therefore, before taking a firm position on ULPs, the party taking the action should review the matter with an attorney or competent consultant. If a charge is filed, the respondent should similarly seek expert help before taking a fixed position.

Normally, ULPs are lodged exclusively by unions, since the nature of collective bargaining makes the allegation of ULPs more advantageous to the union than to the employer. Some employers are so ignorant of ULPs that the mere threat of being charged with a ULP causes the employer to make unreasonable concessions. This is not to suggest that employers should ignore allegations of ULPs. There <u>are</u> bargaining practices which are illegal. Here are some that should be avoided in most situations:

a. <u>Do not make any threats of reprisals</u> because employees join or support a union or express interest in a union. This rule even applies in states where there is no collective bargaining law. About the only instance in which employees may be treated adversely for union activities is when such activities interfere with the normal operations of the agency. But even then, one should seek expert counsel before taking actions against employees for organizational activities.

b. <u>Do not provide or promise benefits contingent upon the outcome of a representative election</u> or other action related to the union. In most states, public employees may freely organize and they are generally protected from any overt pressure from management to discourage such actions. However, in states where there is no bargaining law, there is likely no obligation to bargain.

c. Do not interrogate employees (or applicants) about their union attitudes. The feeling that employees may have about unions is a private matter and not an issue to be questioned by the employer. The right to assembly is a right of every citizen, and it should be treated as such.

d. Do not spy on union activities. The fact that industrial and labor espionage does take place, and the fact that there have been many true stories reported in the press which describe how managerial personnel were caught eavesdropping on the union, do not make such acts right. Suffice it to say here that there is no legitimate excuse for such behavior.

e. Do not give preferential treatment to those who oppose the union. Do not punish those who support the union. Public employees have a right to assemble and organize free of influence from the employer.

f. Do not threaten to discontinue or contract out certain parts of the agency's work, should the employees unionize, or should the union act in a manner unacceptable to the employer. For example, do not threaten school bus drivers that school transportation will be contracted out if the drivers join a union. Or, do not threaten custodians with contracting out, if their union is objectionable to the employer.

g. Do not prohibit union solicitation or discussion after or before working hours, during breaks, and during lunch periods. Employees are generally free for such activities when on their own time, unless there is interference with the normal operation of the agency.

h. Do not prohibit the distribution of union literature in nonwork sites, such as the employees' lounge. Employees generally have the right to communicate about the union.

i. Do not treat union solicitation any differently than you would solicitations from other causes, such as charity. Do not single out the union and treat it more adversely than other organizations.

j. Do not lie about current employee benefits in an attempt to convince employees to remain nonunion. Again, public employees are protected in their right to assembly without interference from the public employer.

k. Do not use the supervisory staff authority to get information from the employees about the union. Such actions are a form of intimidation interpreted by many state labor boards as interference with the right to organize.

l. Do not distribute inflammatory anti-union literature to employees. Although there can be room to debate just what constitutes "inflammatory literature," the best rule to follow is not to distribute literature which is overtly hostile to the union.

Should an employer wish to wage an anti-union campaign--which is the employer's legal right if the campaign is conducted properly--an expert consultant should be retained by the agency. The issue of what an employer can do and cannot do with regard to fighting a union varies from state to state. Additionally, the proper expert has probably had experience in waging anti-union campaigns and should therefore be able to lend valuable assistance.

At this point the reader may conclude that nothing is allowed that displeases the union. This conclusion is not correct. Management can take many actions which the union may not approve of. For example:

a. You may verbally state and distribute literature regarding your views, if you don't violate any of the "don'ts" above. An employer has a general right to objectively discuss union affairs as they relate to the operation of the agency.

b. You may address employees on agency property and agency time, if none of the "don'ts" listed above are violated. Naturally, employees must be paid for attending such addresses.

c. You may counter the union's promise that it will guarantee job security, if the union makes such a claim. You can make it clear that only the employer can guarantee job security.

d. You may compare benefits between union shops and nonunion shops, but be sure your facts are accurate.

e. You may describe convincingly the many benefits that public employees have and what might be the impact of unionization, but you must be careful to be accurate and honest.

f. You may ask the union to describe exactly what it will provide to the employees which the employees do not now have and could not reasonably expect to have without a union.

g. You may describe how the union benefits from organizing employees.

h. You may discuss what happens when some employees join the union, and some don't. You may ask the union to state its views regarding "free riders."

i. You may make it abundantly clear that no one can be required to join the union, unless the employer agrees. You may further define what "union security" really means; i.e., forced union membership. If the union refers to nonunion members as "free riders," you may refer to those forced to join the union as "captive passengers."

j. You may itemize the costs of unionization, i.e., dues, initiation fees, service fees, fines, etc.

k. You may discuss how a labor contract might interfere with the right of management to award bonuses and other special rewards for deserving employees.

l. You can describe how some agencies have turned to contracting out after unionization.

m. You may ask the union to describe exactly what benefits it will to employees. You may explain that only the employer can give wages and benefits for work performed; that only the employer can finally set working condition.

n. You may show that unions sometimes use threats and other acts of coercion to get their way. You may explain your right to deprive employees of benefits should a strike occur. If the union claims to offer strike benefits, make the union prove it has the funds and will use the funds. Ask the union to explain where these funds come from. You may offer statistics which show that salaries and benefits lost during strikes are never regained. You may state your legal right to replace strikers with persons willing to work. You may ask the employees how they expect to live without an income during a strike. You may

describe how unions treat employees who attempt to work during a strike.

o. You may explain that if a representation is to be held that is secret; that no matter what the employee may have said or committed himself to with the union, he can freely exercise his vote in complete confidence. In other words, the employee can change his mind and no one will ever know.

p. You may employ an expert to assist you in your treatment of union organization matters.

If your agency should be charged with an unfair labor practice, here are some suggestions based upon experience with dealing with such matters:

a. Most ULPs are lodged solely as a threat to cause management to make a concession that it otherwise would not make, but keep in mind that the union usually recognizes that the threat is often more effective than the act itself.

b. In most cases, management has at least an equal chance to win a case of an ULP. Therefore, both parties face the same risk of losing.

c. Even if management should lose, the remedy is usually simply to cease and desist from the act which management thought it had the right to perform. Naturally, a loss can give a boost of support for the union and make the governing body look bad in the media. But frankly, a well-counseled agency should not lose an ULP.

d. If the union seems committed to bringing charges of an ULP despite management's good faith bargaining efforts, management

should observe the union's labor and negotiations activities carefully and catch it in a clear ULP and bring similar charges. The advantages of this tactic should be evident to the reader.

e. Practically all states have a record someplace of all of the ULPs reviewed. When faced with an ULP, it is wise to review these cases for applicable precedents. If no applicable precedent exists in your state, you may wish to review similar ULPs in other states to determine the rationale for their disposition.

In summary, there are many legal actions which a public employer may take during efforts to organize a union, and there are many freedoms left to the employer even if a union should become organized. There are approximately 70,000 public sector government agencies in America, including school districts, counties, cities, state governments, and special districts. In theory, most of these could be organized for collective bargaining. In fact, however, at the beginning of the 1980s only about 15,000 government agencies were formally engaged in collective bargaining. And, in the author's opinion, too many of the 15,000 agencies engaged in collective bargaining today are doing so because they took no effort whatsoever to remain free of a union. In many cases these districts just assumed that the recognition of a union was inevitable. Such an attitude was a mistake. Had these districts taken advantage of their legal rights to oppose the unions, many of these districts would be union-free today.

## E. A Public Employer Can Finance An Anti-Organization Campaign

In November 1981, the Michigan Court of Appeals upheld the right of a public employer to expend public funds in order to oppose a union organizing campaign.[2] Understandably, the union involved tried to convince the court that the Michigan bargaining law did not permit such expenditures because they would be an infringement of public employees' right to association. In the case before the court, the Service Employees International Union (SEIU) attempted to organize all nonprofessional employees at the Lapeer County Hospital in early 1979, but the employees voted for "no organization." Upon losing the election, the SEIU lodged complaints with the Michigan Labor Relations Commission (MERC) that the hospital should not be allowed to use public funds to counter organization efforts, but MERC dismissed the union's objections, and the SEIU appealed to the courts.

The court noted that the Michigan Public Employment Relations Act (PERA) was patterned after the National Labor Relations Act, which specifically permits employers to resist union attempts to organize employees. Nor could the court find any reason to believe that the intent of the law was to deny public employers the right to wage anti-union campaigns. The court further noted the PERA was designed to protect the rights of all employees, including those who do not wish to be represented by a union. Despite this ruling, however, managers in other states, who plan to wage an anti-union campaign, should first confer with qualified legal counsel.

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[2]Local 79, SEIU, Hospital Employees Div. v. Lapeer County General Hospital, MI Ct. of Appeals, No. 52079, Nov. 17, 1981.

## VI. HANDLING EMPLOYEE COMPLAINTS

### A. Employees Have a Right to Complain

The right of American citizens to petition their local school boards and local, state, and federal governments is firmly entrenched in the nation's jurisprudence. Additionally, citizens have the right to appeal the decisions of their government. Similarly, but with some minor restrictions, public employees, in their dual role of citizen and public servant, have a general right to petition their public employers and a general right to appeal the decisions of their employers.

The general right of public employees to petition their public employers and to appeal the decisions of their public employers is demonstrated by the plethora of appeals procedures, complaint procedures, grievance procedures, and other review procedures found in local school board policies, local government ordinances, state regulations (and laws), federal regulations, and thousands of public sector labor contracts found at all levels of government employment, all of which are designed in some manner to allow public employees to communicate with their public employer concerning the employer's activities, specifically as those activities relate to the employee's job interests of compensation, benefits, working conditions, and job security, and generally as those activities relate to the efficient and proper operation of the government agency in the best interests of the public. The right of public employees to complain about matters related to their employer's activities is also underscored by numerous legal decisions.

Naturally, there must be some balance between the obvious advantages of freedom of expression by public employees and the need to maintain a disciplined public workforce which is reasonably neutral in political affairs and which in some instances must protect vital confidential information, such as in military intelligence.

The benchmark case which protects public employees in their right to general freedom of expression regarding the activities of their employer is Pickering v. Board of Education,[1] in which decision the U.S. Supreme Court stated a teacher could not be dismissed for statements about school board policy without "proof of false statements knowingly and recklessly made." According to this decision, public employees would even be allowed to make minor errors in their statements about their employer. However, Pickering did not give carte blanche right to public employees to engage in personal attacks on their immediate supervisors, to release confidential information, or to engage in expressions disruptive to the public agency. In short, Pickering did not foreclose on all employee dismissals based on freedom of expression. To this day public employees still are dismissed for expressions which are to the disinterest or harmful to the public employer. Nevertheless, the legal record with regard to public employees being dismissed for freedom of expression is mixed. For example, in federal employment, federal employees may be dismissed "only for such cause as will promote the efficiency of the service.[2] At the state and local levels of

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[1] 391 U.S. 563 (1968).

[2] 5 U.S.C. § 652(a) (1970).

government there are numerous cases of public employees being dismissed because of public statements about their employers. For example, a Nevada school teacher was fired for "unprofessional conduct" because he publicly opposed compulsory school attendance laws,[3] while another teacher was fired in Connecticut for "misconduct" when she distributed flyers critical of the administration and its policies.[4] However, the record on attempts to dismiss public employees for public expressions is also replete with failures, most of which never got to court.

Although Pickering has set a rather broad tolerance for freedom of expression by public employees, the record on dismissal of public employees who criticize their public employers continues to be mixed. While members of the police force in the U.S. Canal Zone were restricted in their rights as policemen to criticize Canal Zone policies due to the tense situation there,[5] a Baltimore (Maryland) policeman was allowed to make very critical public comments on television about the morale of the police force.[6]

Pickering recognized that there may be times that free speech by public employees about their employer may not be tolerable, such as in cases where ". . . the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine

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[3]Meinhold v. Taylor, 89 Nev. 56, 506 P.2d 420 (1973).

[4]Gilbertson v. McAllister, 403 F. Supp. 1 (D. Conn. 1975).

[5]Meehan v. Macy, 392 F.2d 822, Modified, 425 F.2d 469 (D.C. Cir. 1968). See also Kannisto v. City and County of San Francisco, 541 F.2d § 841 (9th Cir. 1976).

[6]Brukiewa v. Police Commissioner, 257 Md. 36, 263 A.2d 210 (1970).

the effectiveness of the working relationship between them. . . ." As a result of this language a number of public employees have been dismissed. For example, a school superintendent was dismissed for denouncing some school board members seeking reelection, and the discharge was upheld by a federal court.[7]

The method employed by the public employee in criticizing the public employer can be a factor in whether or not the employee is dismissed. Generally speaking, disruptive forms of free speech, such as demonstrations on the job, can be grounds for dismissal. For example, some black employees of the U.S. Census Bureau were dismissed when they picketed in the agency cafeteria to demonstrate their allegations of racial discrimination. Their dismissal was upheld.[8] However, a teacher in New York was fired for wearing a black armband protesting the Vietnam War, but the dismissal was reversed.[9]

The point of discussing Pickering in such detail is to underscore that public employees have a general right to complain publicly about the activities of their employer. One way to minimize the chance of such public criticisms (which are almost always controversial) is to provide a complaint procedure which allows and requires that such complaints be processed through the complaint procedure. Although there is no guarantee that such a procedure will curtail all public criticisms of the public employer by its employees, a *responsive* complaint procedure can allow the employer prior opportunity to settle controversial issues privately.

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[7]Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975).

[8]Waters v. Peterson, 495 F.2d 91 (D.C. Cir. 1973).

[9]Russo v. Central School District No. 1, 469 F.2d 623 (2d Cir. 1972).

For example, in the celebrated U.S. Central Intelligence Agency case, an ex-CIA agent (Victor Marchetti) was prohibited from publishing his criticisms of the CIA because he had signed a secrecy agreement.[10] This case does not guarantee, however, that any government agency which installs a complaint procedure will automatically stop all public criticisms by public employees of their public employers. Such a procedure will, however, *if responsive to the criticism,* assure that the employer has a prior and private chance to settle the matter, except in "whistle blowing" cases, where the complainant might be informing on persons who process complaints. For example, in the nationally publicized case of A. Ernest Fitzgerald, who publicly accused the U.S. Defense Department of inexcusable cost overruns, Mr. Fitzgerald was fired, but after years of litigation costing hundreds of thousands of dollars in legal expenses, he was reinstated to federal service, thus setting a precedent for all public employees to publicly reveal inappropriate activities of their public employers.[11]

Based upon the balance of legal decisions over the years, any public agency, whether unionized or not, is well advised to have a complaint procedure, even if a grievance procedure exists in the labor contract, if one exists. Such procedures have developed over the past two hundred years because of a demonstrated need. Wherever workers assemble, whether in the public or private sector, there are bound to be complaints over the activities of the employer, and these complaints will be expressed

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[10] Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975).

[11] Fitzgerald v. United States Civil Service Commission, 407 F. Supp. 380 (D.C. 1975), reversed on another ground, 554 F.2d. 1187 (D.C. Cir. 1977).

one way or another. Over a protracted period of time most public employers have come to accept this fact, even though reluctantly in some cases.

Even where there is a labor contract in force between a public employer and an exclusive representative of the public employees, public employees are still protected in their right to address the governing body. For example, in 1975 in Wisconsin (a state with a bargaining law), in a school district where negotiations were being conducted between the school district and the exclusive representative of teachers, a teacher who was not a union member was allowed to address the school board in public session over the objection of the union on matters then under negotiations. Soon thereafter, the union lodged an allegation of an unfair labor practice against the school board, claiming that by allowing the teacher to speak, the exclusive representative of teachers had been bypassed. Although the Wisconsin Employment Relations Commission (the agency which administers the bargaining law) supported the union, as did the Wisconsin Supreme Court, the decisions were reversed by the U.S. Supreme Court which maintained that the state's collective bargaining law did not supercede the individual public employee's First Amendment right to address the employer. The Court stated: "Restraining teachers' expressions to the (school) board on matters involving the operation of the schools would seriously impair the board's ability to govern the district."[12]

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[12]Madison School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976).

## B. Advantages of a Complaint Procedure

Fortunately, there are only a few unenlightened public employers and government administrators remaining who refuse to recognize that an appropriate employee complaint procedure contributes to the overall efficiency of the public agency. A public employer should provide a complaint procedure for employees for a number of reasons:

### 1. A complaint procedure helps identify legitimate problems which should be corrected

All places of work have room to improve efficiency and employment conditions. The identification of these areas for improvement can come from the agency management staff, the governing body, the public, *and the employees*. Each of these groups have their own particular insight into the operation of the government agency, and each of these groups has the potential for offering useful suggestions to improve the services of the agency.

### 2. A complaint procedure enhances employee loyalties

When employees view their employer as a friend to whom they can carry their problems, concerns, and suggestions, there is bound to be present a sense of trust and camaraderie. Such positive relationships lay the foundation for the employees to support the employer. This type of commitment from employees cannot be bought. It can only be earned, and it is priceless!

3. **A complaint procedure improves employee morale**

A complaint procedure improves employee morale by relieving employees of carrying problems and worries to their jobs, thus releasing employees to commit themselves more fully to their duties. As employees learn that their employer is concerned with their problems, their attitudes toward their jobs become more positive and they are more likely to perform beyond the minimal requirements of their jobs.

4. **A complaint procedure is a form of a suggestion procedure**

In a way, every complaint, whether legitimate or not, is a form of a suggestion which the employer should consider. If the complaint is legitimate it suggests that the employer is in need of making certain changes. If the complaint is meritless, it suggests that there is some miscommunication, or that there is need for better employee inservice or improved employee relations.

5. **A complaint procedure minimizes the likelihood that controversial criticisms will be carried to the public**

As has been discussed in this section, Pickering gives employees rather broad rights in publicly criticizing their employers. A number of precedents, however, seem to indicate that such freedom of expression can be reasonably and legally controlled by requiring that some internal procedure be followed first. Generally speaking, the courts are hesitant to take on cases until agency administrative review procedures have been exhausted. Consequently, a *responsive* complaint procedure can give the public employer a *prior* and private opportunity to settle a complaint which might otherwise become a public controversy.

### 6. A complaint procedure can help avoid unionization

As discussed elsewhere in this book, one of the main reasons that employees organize is because of the failure of the employer to take seriously the complaints of its employees. When an employer is unresponsive to the legitimate complaints of its employees, why shouldn't the employees seek out someone who is responsive; namely, a union? The alternatives for the employer are few. Either the employer must be responsive to employee complaints or the employer will deal with a union or uncooperative employees.

## C. Ingredients of a Good Complaint Procedure

Based upon considerable experience and research, the author has determined that a good complaint procedure should follow a number of rules, the most important of which are:

### 1. The definition of a complaint should be broad

For purposes of discussion here a complaint shall be defined as an expression of concern by an employee (or employees) to his supervisor over the activities of the employer, excluding grievances as defined in the labor contract (if one exists) and other matters for which a method of review is prescribed by law or any rule or regulations having the impact of law or any other matter which according to law the resolution of which is beyond the scope of the employer's authority to remedy. Under these conditions all legitimate complaints, concerns, and grievances would be provided for and the employer would enjoy the opportunity to settle all such matters in an orderly and private manner.

2. **Complaints should be processed through the complaint procedure**

As discussed earlier in this section, public employees have a broad freedom to publicly criticize their employers and all such public criticisms are potential controversies. By requiring that all complaints (as defined above) be discussed with the employer first, the employer has taken an important step legally and reasonably to avoid public criticisms which might otherwise be harmful to the employee, the employer, and the public generally.

3. **Complaints should be lodged promptly**

Any complaint which is worthy of consideration is worthy of prompt consideration. An employee who is unwilling to seek an immediate solution to his complaint should not be entitled to a sympathetic response from his employer. Either the complaint should be registered promptly or there is no complaint. This normally means that employees should be required to register their complaints within no more than twenty days and no less than ten days from the time when the employee knew, or should have reasonably known, of the action which gave rise to the complaint. This requirement precluded the possibility of employees saving their complaints until it is too late to resolve them.

4. **Responses to complaints should be prompt**

If employees are expected to lodge their complaints promptly, so should employers equally be expected to respond promptly. Failure on the part of the employer to respond promptly at all levels of the complaint procedure simply conveys to employees a lack of interest on the part of the employer and allows the complaint to fester and grow

worse. Normally, the employer should be required to respond to complaints within about five days.

5. **The initial step should be an informal discussion**

Once a complaint is put into writing the flexibility for resolving the complaint is restricted, because a written document creates an air of formality and causes the parties to concentrate only on what is written, even if it does not reflect the real problem. Therefore, the complainant should be allowed and encouraged to discuss his complaint informally with his immediate supervisor. In this setting the complainant is free to modify his complaint, press his complaint, or withdraw his complaint. Similarly, the immediate supervisor should feel free at this informal meeting to take any reasonable, legal, and good faith action to settle the dispute.

6. **The formal complaint should be in writing**

If the complaint is not resolved informally between the employee and his immediate supervisor, it should be put in writing, preferably on an official form, which assures that the complaint is made clear and contains necessary procedural information, such as date of the alleged act which caused the complaint, date of the formal submission of the complaint, exact nature of the complaint, desired remedy for the complaint, etc. It is important to underscore here that the written description of the complaint and the alleged actions which caused the complaint must be very clear, because all future review of the complaint will be based on that information. If such information is not clear or not complete, much time will be wasted and the problem will have less chance of being satisfied.

7. **All complaints should be resolved at the lowest administrative level**

Any complaint which is not resolved at one level is likely to be more difficult to resolve at the next administrative level. As a matter of fact, most complaints not resolved at the first administrative level usually go through to the last step, whatever that step may be. When complaints are not resolved at the initial level and they are referred successively higher, they generally become more entangling and entrenched and thus more difficult to settle. Therefore, a *thorough* investigation of a complaint should be conducted at the very outset and every effort should be made to resolve it informally at that level. Incidentally, if the employer is willing to expend the good faith time and effort, experience indicates that 99 percent of complaints can be handled satisfactorily without resorting to the formal complaint procedure.

8. **Managers should not be covered by the same complaint procedure**

In almost all employment settings in both the private and the public sectors, supervisors, administrators, executives, and other members of the management team are considered to be an extension of the employer. As such, they must represent the employer with fidelity. Consequently, a manager could not give his undivided commitment to his employer should he be covered by a complaint procedure in which he can be both the complainant and defendant. This is not to suggest necessarily, however, that managers should not be allowed to complain, only that if they are allowed to present complaints (and they should be) their complaints should be processed by a different and separate complaint procedure.

9. **A union should not be allowed to represent a complainant where no union is recognized**

Many employees understandably want to have someone with them when they complain about the activities of the employer, and the employees should be accorded this opportunity. The employee should be allowed to have present another employee, but the complainant should speak for himself and there should be no representation by a union or an attorney, unless the matter is extremely important or involves legal questions. For example, if the complaint involves accusations of criminality or wrongful dismissal, the employer may be required to deal with a legal or union representative of the employee. But most complaints are matters of routine employee-employer relations and can be and should be settled directly between the employee and his immediate supervisor without the intervention of third parties.

10. **Work now, complain later**

An employee is not released from doing something he has complained of just because he has lodged a complaint. The employee must, during and notwithstanding the pendency of any complaint, continue to observe all assignments and applicable rules and regulations of the employer until such complaint has been settled. If employees were allowed to stop performing any duties which they complained of, there would be an increase in complaints and a decrease in work performed.

11. **Complaint processing should interfere minimally with work**

Although responding to employee complaints is a legitimate and laudible function of management, effort should be made to assure that the processing of complaints does not take employees from their normal

duties for an inordinate amount of time. Careful scheduling can usually minimize the amount of time that employees are away from their primary duties. For example, most teacher complaints can be discussed before or after school, during a lunch period, or during a "free" period.

12. The complaint procedure may not replace overriding procedures

State and federal civil service regulations often provide various types of appeals procedures for certain personnel actions taken by an employer. A number of federal and state laws also provide procedures by which employees may appeal decisions or actions of the public employer. For example, laws exist to prohibit employers from discriminating against employees on the basis of age, sex, and race. These laws provide specified procedures for employees to follow when they allege discrimination by the employer. In other words, the complaint procedure should not process complaints which have other review procedures prescribed by law. For example, appeals over employee dismissals are often prescribed by some state or federal law or civil service regulation having the impact of law. Nor should the complaint procedure process complaints which require remedial authority beyond that of the employer. By way of example, employees in a public school cafeteria might ask to be relieved of a legal requirement to have a physical examination performed on them once a year. In this case, the school board would lack the authority to satisfy the employee request.

13. Conduct all hearings fairly

Each time that a member of management meets with a complainant, the meeting should be conducted with decorum and a good faith effort to resolve the matter on an amicable basis. This means many things. It

means that the supervisor should take reasonable steps to assure the employee that he is free to express his concerns without fear of reprisal. It means that the supervisor should allow ample time for the matter to be fully explored. In summary, the supervisor should treat the employee just like the supervisor should like to be treated if he were complaining to his supervisor.

14. **Each complaint should be dealt with as if it were to be finally ruled upon by an impartial judge**

One of the most common and serious mistakes made by supervisors in processing complaints is to fail to take the complaints seriously enough and to fail to take accountability for settling the issue. Consequently, relevant facts are often overlooked and insufficient effort is made to satisfy the complaint. As a result, the complaint is processed upward unnecessarily, growing more difficult with each referral. And then at the last step, where there is greater impartiality in the review, the important facts are discovered, usually to the surprise, disappointment, and embarrassment of the managers involved in the complaint. If the facts do indicate that lower echelons of management have been in error, then the employee feels more convinced that he has been wronged and management's credibility is harmed unnecessarily. The best rule to follow to avoid such debacles is to initially review each complaint thoroughly through the eyes of an impartial judge and then proceed accordingly.

15. **Identify exactly what relief is sought**

Sometimes complaints are reviewed and no one, including the complainant, determines exactly what remedy will be mutually acceptable,

if the complaint is valid. The identification of the desired remedy is an important aspect of resolving complaints. Often the relief that will satisfy the complainant is very minor and easily granted. Under such circumstances valid complaints can sometimes be satisfied promptly. On the other hand, some expectations for remedy are beyond the will or the power of the employer to grant. In such cases, management must deal with two problems instead of one--the resolution of the complaint, as well as the resolution of the dispute over the remedy, if the complaint is valid. Therefore, the identification of the expected relief should be clarified at the outset, even though it may change as the complaint is progressively reviewed.

16. If in doubt, listen

Sometimes an employee will present an issue not governed by the complaint procedure, or an employee will present a complaint so vague and disjointed that the immediate supervisor is unable to understand exactly what the problem is or what the employee wants. In such cases, the best policy is to be patient, listen, ask probing questions, and help the complainant clarify his concerns.

17. Give the complainant a clear answer at all levels

When the exact nature of a complaint is known and the desired remedy has been identified and the complaint has been investigated, the complainant is entitled to a *clear* answer. There are only two legitimate answers to a complaint--"Sustained" or "Rejected." If sustained, the remedy should be applied immediately. If rejected, the reason for the rejection should be stated and the complainant must decide if he wishes to appeal further.

**18. Visit the site of the complaint**

Many complaints concern conditions at the actual work location. For example, many complaints arise over allegations of unsafe working environments. In such cases, a visit to the actual work site is highly advisable. Some complaint investigations simply cannot be completed without such a visit. The author recalls a complaint from a cafeteria employee who complained that floor safety treads were often not in place, creating a potentially dangerous situation for employees. However, the immediate supervisor in the cafeteria denied the charge. In two separate unannounced visits to the cafeteria, the safety treads were not in place. As a result, the hazardous condition was corrected; the employee was satisfied; and the supervisor received a valuable career-growth lesson.

**19. Interview witnesses**

Quite frequently, the adjudication of a complaint requires that persons familiar with or associated with the circumstances surrounding the complaint be questioned in order to provide more complete information than would be the case otherwise. In one situation experienced by the author, a night maintenance worker complained that the security guard was often not at his post. A quick on-site interview of witnesses corroborated the allegation. When the security guard was confronted about his absences, he admitted that he was infrequently away from his exact post in order to check on some security problems elsewhere. As a result, the night maintenance worker was pleased with the response of management not only because his original complaint was satisfied, but also because as a result of the testimony of the security guard, additional part-time security assistance was added to the building.

## 20. Apply all regulations consistently

School districts, municipalities, state agencies, and federal agencies are *public* enterprises. They are not the private affairs of those who happen to work for the agency at a given moment in time. Of all the common errors made by public officials, there is one that is most inexcusable, and that is the practice of applying public policies, regulations, and work rules in an inconsistent and arbitrary manner based upon the whim, prejudice, preference, and ignorance of the public official involved. Some members of public governing bodies and their executives seem to think that they may follow their private beliefs in the application of public policies. The author has personally witnessed personnel directors who employ on the basis of personal preference, supervisors who bend clear work rules to please their friends, chief executives who overlook important rules they are supposed to follow, and members of governing bodies who think that laws apply to everybody except those who happen to be in a governing position at a given point in time. It is in such cases of inexcusable abuse of power given by public trust that unions can play a vital helpful role by exposing such persons as they exploit their positions of public trust for their own personal reasons.

As discussed elsewhere in this book, the inconsistent application of agency policies, regulations, and work rules is one of the main causes for employees to unionize and rightfully so. Public officials who cannot manage public business in a responsible manner deserve to be confronted by a union.

21. Examine past practice

In order to determine if a regulation is being applied consistently, it is often necessary to review what has been the established past practice in applying that regulation. This is not to necessarily suggest that all past practices are binding on present and future actions. Past practices with regard to the application of a given rule simply gives insight into how the rule has been interpreted over a period of time. For example, in a mid-western school district a teacher complained that he should have been interviewed when he requested a transfer from one school to another because the applicable regulation stated that teachers requesting transfer would be "considered." Long standing past practice was that the word "considered" meant an inverview, which in this case had been denied to the teacher. When the complaint was reviewed by the superintendent, the receiving principal was instructed to interview the teacher, but beginning with the following school year the regulation was revised to make such interviews at the discretion of the receiving principal.

22. Investigate the complainant's background

Practically all workforces contain at least one chronic complainer, troublemaker, malingerer, or someone of borderline acceptability. One of the many facts that should be sought out when an employee complains is the work record of the complainant. Some employees are simply more prone to complain than others who face situations identical to that complained of. In such cases, the supervisor must take into account the personal aspect of the complainer in deciding what to do. Typically, the appropriate action called for in such instances is to offer some firm employee counseling.

23. **Collect all evidence**

In order to resolve a complaint fairly, all relevant evidence must be collected as soon as possible. Some of the questions which might be asked are: Has the complaint been submitted within the proper time frame? Is the complaint clear? Is the desired remedy clear? Is the remedy acceptable, if the complaint is sustained? What is the employee's background? What is the current applicable rule being complained of? What is the past practice in this case? Are there witnesses? What written documents are needed? Has there been a similar problem in the past? Has the work site been visited? Have all appropriate personnel been interviewed? Depending on the nature of the case, other relevant questions can be raised.

24. **Complaint processing should be private**

For purposes of discussion here, a complaint is an expression of concern by an employee to his supervisor about the activities of the employer. As such, a complaint is a private matter, at least at the initial stages, between the employee and his supervisor. By keeping the matter private there is greater hope for resolving the complaint. The more public the complaint becomes the more difficult it becomes to settle. The longer a complaint festers, the more complex it becomes. The more people who become involved in the complaint, the more difficult the complaint becomes to satisfy. The rule, then, is to settle all complaints quickly and privately with as little fanfare as possible.

25. Do not hide relevant information

Having processed hundreds of employee complaints and grievances, the author has found that certain patterns emerge with regularity in the processing of employee concerns. One common mistake made by supervisors generally is to hide information relevant to the complaint out of fear that the supervisor has done something wrong. The author has been very successful in avoiding such problems by explaining to the supervisor in each instance why it is to his advantage to reveal all relevant facts at the outset, no matter how difficult that might be. By having a frank and open examination of the supervisor's role in the complaint, there is greater hope of resolving the matter without surprised embarrassment in the final stages of processing the complaint. If there is doubt that the supervisor is revealing all needed facts, the person conducting the review should undertake a careful investigation of the supervisor's actions in the matter complained of.

26. Control the emotional tone of hearings

In the presence of their superiors, some employees are understandably uncomfortable, particularly if they are complaining of some action of the employer. Even some supervisors are uneasy when questioned about a complaint from an employee. Keeping this in mind, special care must be taken to assure that all meetings involving persons associated with the complaint must be conducted in a manner to encourage open and frank discussion. To accomplish such a tone, all complaint hearings should be carried out in a friendly and good faith manner. The employee should understand that it is his right to complain free of fear, and the supervisor should understand that he is not on trial but is simply

assisting in the resolution of a personnel problem. Under no conditions should a complainant be threatened because of his complaint. By controlling the emotional tone of complaint hearings, the door is kept open for an amicable settlement.

27. Try to mediate a settlement

The vast majority of complaints are informally resolved between the supervisor and the employee, without resorting to formal hearings or third party intervention. However, should the complaint go beyond the immediate supervisor and be reviewed by another manager, that person should make all reasonable effort to mediate the dispute by encouraging either or both parties to bend. However, the manager should not carry his mediation efforts to the extreme of being unfair to either party or harming the management rights of the employer.

28. Keep management informed

All public employers should have someone who serves in an employee-employer relations capacity. In small agencies this role can be filled informally by someone (preferably not the chief executive) who may have other responsibilities. In any case, there must be someone who processes complaints and whoever that person is he should be aware of what complaints are being lodged and he should keep the chief executive informed of the more controversial complaints; otherwise, the chief executive will hear incomplete reports of complaints through the rumor mill, causing unneeded concern and confusion.

29. **If arbitration (either binding or advisory) of complaints exists, it should be according to applicable arbitration rules**

A few complaint procedures allow for impartial third party review of unresolved complaints as the final step in the complaint procedure. In such instances, the hearing of complaints should be conducted according to the hearing procedures of the American Arbitration Association or some other applicable state or federal arbitration procedure.

## D. A Sample Complaint Procedure

In order to give the reader an example of a typical complaint procedure, the following hypothetical procedure is offered. Naturally, it can be easily modified to suit local conditions.

### COMPLAINT PROCEDURE

In order that employees may express their concerns freely, the following complaint procedure is provided as the official procedure for the resolution of employee complaints.

Definition: A "complaint" shall mean an expression of concern by an employee (or employees) to his supervisor over the activities of the employer, excluding matters hereinafter described.

All complaints will be processed exclusively by the procedure described herein.

Step 1: The employee shall first discuss his complaint with his immediate supervisor with the object of resolving the complaint. The employee shall state the precise complaint and his desired relief. Should the complaint be beyond the authority of the immediate supervisor to resolve, he shall refer the employee to the proper administrator. Otherwise, the immediate supervisor will give his final response

to the employee within five work days of receiving the complaint. At the time of his response, the immediate supervisor shall refer the employee to the proper administrator to whom the employee may appeal, if the immediate supervisor has rejected the complaint.

Step 2: If the employee wishes to process his complaint beyond step 1, he shall contact the administrator to whom he has been referred in step 1 within five working days of the referral. The administrator at step 2 shall be that person designated by the chief executive as the most appropriate administrator to hear the appeal. This administrator shall respond to the employee's appeal within five work days of receipt of the appeal.

Step 3: If the employee wishes to process his complaint beyond step 2, he shall contact the chief executive within five days of receipt of the administrator's response in step 2. Should the chief executive not be able to satisfy the employee within ten days of receipt of the appeal, he shall refer the complaint to the governing body at its next meeting.

Step 4: The governing body shall determine if it shall conduct a hearing on the complaint. If a hearing is held, it shall be conducted according to the approved hearing guidelines. Within five days of the governing body's decision, the decision shall be communicated to the employee. The decision of the governing body shall be final.

Special Provisions

1. In processing complaints, employees are to communicate directly with the appropriate administrator. Intermediaries and representatives are not to be used. With the permission of the administrator

hearing the complaint, the employee may have another person of his choice present at any meeting at which the complaint is being discussed with the employee, except at any meeting of the governing body where the complaint is being considered. In which case the employee at his own option may have present someone of his own choice who may advise the employee.

2. This procedure is not applicable to members of the management team for the processing of complaints.

3. An employee who wishes to lodge a complaint must do so within ten days from the time when the employee knew, or should have reasonably know, of its occurrence.

4. The employee who has lodged a complaint shall, during and notwithstanding the pendency of any complaint, continue to observe all assignments and applicable rules and regulations of the employer until such complaint and any effect thereof has been fully determined.

5. Meetings, at which the employee's presence is required, shall be arranged at a time and place so as to minimally interfere with the employee's regular duties.

6. Failure at any step of this procedure to communicate the decision on a complaint within the specified time limits shall permit the complainant to proceed to the next step. Failure at any step of this procedure to appeal a complaint to the next step within the specified time limits shall be deemed to be acceptance of the decision rendered at that step.

7. Any matter for which a method of review is prescribed by law or any rule or regulations having the impact of law, or any matter

which according to law is beyond the scope of the employer's authority to remedy shall be excluded from this complaint procedure.

8. A complaint by an employee alleging improper dismissal or nonrenewal of employment shall not be coverable by this complaint procedure. Such complaints shall be reviewed according to the employer's applicable procedure for the appeal of such complaints.

## E. Review of Complaints by the Governing Body

Some complaint procedures include a review by the governing body, such as the school board. In such instances the governing body should make every effort to review complaints in a fair and judicial manner. Where the governing body is included in the complaint procedure, the governing body, or individual members thereof, should be prohibited from discussing the complaint until the complaint formally comes before the entire governing body (or subcommittee, if subcommittees are used) for formal review. To allow members of the governing body to discuss the complaint before the formal hearing would make a fair and impartial hearing difficult, if not impossible. As a suggested guide for those governing bodies which wish to review complaints, the following hearing procedure is offered.

### HEARING PROCEDURE FOR EMPLOYEE COMPLAINTS

I. Scope

This procedure will be followed in cases where the Governing Body holds a hearing involving a complaint of an employee. In the case of a complaint the governing body may choose to makes it determination in a complaint matter on the basis of the written evidence presented by the employee and the recommendation of the Chief Executive.

II. Procedure Prior to Hearing

A. Prior to the hearing before the Governing Body, the procedure to be followed shall be that prescribed by the complaint procedure. Failure to abide by such procedure may be cause for a denial of hearing.

B. The complainant and the Chief Executive shall each mail to the other at least five working days prior to the hearing, or deliver to the other at least three working days prior to the hearing, a copy of each document, report, or other writing which he/she intends to introduce at the hearing. Failure to comply shall be grounds for denial of the introduction of the writing at the hearing, except that the Governing Body may accept a writing when good cause for the failure to furnish it earlier is shown.

In addition, the Governing Body shall accept an otherwise admissible writing which has not been so furnished if the writing was not available to the offering party within the time period specified, but such writing shall be furnished to the other party as soon as practicable after it becomes available.

III. Hearing Procedure

A. Procedural Matters

1. The hearing shall be presided over by the Governing Body chairperson or in his/her absence, the vice-chairperson, or in his/her absence by such other member as the Governing Body may designate.

2. The chairperson or other presiding member shall make all rulings concerning evidence, objections, continuances, and other procedural matters subject to being overruled by majority vote of the members present on motion of any member.
3. Strict adherence to the formal rules of evidence applicable to actions in a court of law will not be insisted upon. However, the evidence and argument shall be limited to the issue or issues to be decided by the Governing Body.
4. At each stage of the hearing the moving party will be called upon first to proceed. In a complaint hearing, the complainant is the moving party.
5. The parties may stipulate such writings, summaries of evidence, and other matters as they may agree upon.
6. The hearing shall be private unless a public hearing is requested by the complainant. A request for a public hearing shall be given by mailing notice thereof to the Chief Executive at least five (5) working days prior to the hearing, or by delivering notice thereof to the Chief Executive at least three (3) working days prior to the hearing.
7. At the beginning of the hearing each side shall submit a list showing the names of each representative and of each prospective witness. This list is for record purposes only, and neither side will be penalized if unexpected circumstances force the calling of different witnesses.

8. A stenographic record or tape recording of the hearing shall be taken, except that in a complaint hearing, the parties may dispense with same by agreement. In a complaint hearing the two parties shall share equally the cost of recording and any party requesting a transcript shall bear the expense of its preparation.

9. On motion of any party, or upon its own motion, the Governing Body may vary any requirement of these rules not mandated by statute when the interests of justice would be better served thereby. Failure of either party to abide strictly by any of these rules which are not so mandated shall not be deemed a substantial defect, and the opposing party's right to object thereto shall be deemed waived, unless the issue is raised prior to the close of the hearing.

B. The Hearing

1. Opening statement. Each party shall give a brief opening statement setting forth the issues to be addressed and the Governing Body action requested.

2. Evidence:

(a) Each party shall present its evidence in the form of witnesses and/or documents, and each shall be afforded an opportunity to crossexamine opposing witnesses.

(b) Rebuttal evidence shall be permitted in the discretion of the Governing Body.

IV. Decision

The Governing Body shall give the complainant its written decision within thirty (30) days after completion of the hearing. If the

thirtieth day is a Saturday, Sunday, or legal holiday, its written decision shall be given by the next working day.

## F. Does a Union Have a Constitutional Right to Lodge a Complaint?

Whether unionized or not, the question of whether or not a union is entitled to lodge a complaint is often raised. Naturally, if a labor contract exists which allows a union to complain on its own behalf or on an employee's behalf, the question is moot. However, in other cases, this question has been answered by the U.S. Supreme Court, which on April 30, 1979, ruled that a state or local government does not violate the constitutional rights of its unionized employees by refusing to allow their union to file grievances in their behalf. The Court disposed of the case, which involved the Arkansas State Highway Department and the Arkansas State Highway Employees, Local 1315, without hearing arguments and with an unsigned majority opinion reversing the 8th U.S. Circuit Court of Appeals.

The protections of the First Amendment include the rights of an individual to speak freely, associate with others, and petition his government for redress of grievances, and the right of associations to engage in advocacy on behalf of their members, the high court said. But, its opinion added, "The First Amendment is not a substitute for the national labor relations laws."

In the Arkansas case, two highway department employees each sent a letter to Local 1315 in which they stated a grievance and asked the union to process it. The local sent the letters to the Department, noting that it represented the employees. The Department did not respond. The employees then complained directly to a Department official.

A U.S. District Court judge, upheld by the 8th Circuit, found that the Department, in violation of the First Amendment, had denied the union the right to submit effective grievances on its members' behalf.

In the unsigned opinion, the Supreme Court held that the procedures used by the Department "might well be unfair labor practices" under federal labor law, but federal labor laws do not apply to the public sector. But that doesn't establish a constitutional violation, the opinion said. The First Amendment doesn't "impose any affirmative obligation on the government to listen, to respond, or, in this context, to recognize the association and bargain with it."

## G. Workers May Shun Hazardous Work

In a few isolated work situations, an employee may complain that certain work assigned to him may be a danger to his safety, health, or welfare. For example, an assignment to clean away dangerous chemicals might be viewed as hazardous to those assigned to do the cleaning. What should be done when faced with such a situation? The U.S. Supreme Court has given some insight in a ruling which it handed down on February 26, 1980. The Court ruled that workers may refuse tasks they consider unsafe without suffering reprisals by their employer. The Court unanimously upheld a federal job safety regulation, vigorously challenged by industry, which allows such refusal when there is a "real danger" of death or serious injury and not enough time for a worker to go through ordinary channels of complaint. Under the ruling, an employer can deny wages for the unworked time, but the employer cannot fire, reprimand, or otherwise "discriminate" against an employee who in good faith declines to work, citing unsafe conditions.

The case originated at a Whirlpool Corporation applicance plant in Marion, Ohio, where a worker fell to his death in June 1974 through a metal screen twenty feet above the floor. The screen was designed to catch appliance parts that occasionally fell from a conveyor belt above it. Periodically, maintenance workers had to scale the screen and walk along it to clear off the fallen part. Virgil Deemer and Thomas Cornwell had complained about the condition of the screen just weeks before their co-worker fell through it and died. After the death, they filed a complaint with the Occupational Safety and Health Administration (OSHA) and refused their foreman's order to continue working on the screen. The two men were formally reprimanded for their "insubordination" and deprived of six hours pay for time they did not work. OSHA and the men challenged the action, citing an OSHA regulation giving them the right to decline work in a hazardous circumstance. Whirlpool challenged the regulation in the courts, claiming that it went beyond the law setting up the federal agency, OSHA.

Justice Potter Stewart, writing for the unanimous Court, held that the regulation was a valid one, which confirmed with the law and the purposes of the law--to protect workers against unsafe working conditions. It would contradict the act's purposes, the Court said, to deprive "an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous." It is especially necessary "since OSHA inspectors cannot be present around the clock in every workplace."

Employers are protected from abuse of the OSHA regulation by still having the right to challenge in court an employee's good faith

and by seeking his discharge or reprimand, the justices said in the case of Whirlpool v. the U.S. Secretary of Labor.

Although the Court's decision arose out of a dispute in the private sector, a public employer would be well advised to think twice before forcing an employee to perform tasks which he sincerely views as a threat to his health and safety.

## VII. THE MANAGER'S ROLE

### A. Even Uncle Sam's Top Executives Band Together

In the fall of 1980, approximately 400 top executives of the U.S. Federal Government, who were members of the Senior Executive Service (SES) and making $50,000 per year and over, formed an employee organization entitled the Senior Executive Association (SEA). According to one of its members, the SEA was formed because, "We don't have the right to bargain collectively. . . ." The spokesman went on to say, "We can do more as a group than we can as individuals." Soon thereafter, the SEA brought a "breach of promise" suit against the federal government--all of this according to extensive coverage in the October 25, 1980, issue of The Washington (D.C.) Post newspaper.

### B. School Principals are Union Members, Too

To discover the range of attitudes toward administrator and supervisor unions, James Sweeney, an assistant professor of educational administration at Iowa State University at Ames, and Larry Rowedder, Superintendent of the Denison Community Schools in Iowa, surveyed public school administrators and school board presidents in two states, Iowa and Connecticut. Iowa was chosen because unions of managers (school principals) are prohibited by law; while Connecticut was chosen because the state's bargaining law does not prohibit unionization of school principals, and consequently 80 percent of the school principals are

unionized. According to the results of the survey, school principals in both states favored collective bargaining by management personnel.[1]

The authors also made the following five observations about Iowa:

- The management team concept in Iowa apparently exists only in the eye of certain beholders. Although 90 percent of superintendents, 85 percent of elementary principals, and 80 percent of school board members surveyed indicated that their school system used the team concept, only 62 percent of the secondary principals shared that view.
- A direct relationship exists between principals' satisfaction with salaries and fringe benefits and their attitude toward formal bargaining. Principals who reported below-average salaries and benefits were strongly pro-union, while those who reported above-average pay and benefits were not.
- Secondary principals favored formal bargaining more than elementary principals did.
- Principals with one to five years of experience were less enthusiastic about unions than their older, more experienced colleagues.
- School board presidents and superintendents strongly opposed unions because of fears the unions might decrease principal effectiveness.

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[1] "What Principals Want - and Get - From Their Unions," The Executive Educator, National School Boards Association, September 1980.

## C. Old Hands in Connecticut

Most school administrators and board presidents in Connecticut are old hands in the bargaining business, the authors say, but they disagreed on the benefits of administrator unions. Principals surveyed said bargaining had helped them increase their voice in decision making, regain some authority, improve communication with the superintendent and board, clarify their role in the school system, increase their job security, and enhance their salaries and fringe benefits.

Principals also indicated that bargaining favorably affected their morale. Superintendents and board presidents, however, disagreed, according to the authors. They had strong opinions that salary and benefits were not improved through administrators' bargaining, that relations between principals and the superintendent and board had suffered because of bargaining, and that the principals' image was hurt as a result of unions. Superintendents did admit, however, that bargaining helped clarify principals' roles and had raised principals' morale.

From their study, the authors predict that principal unions will continue to grow because principals see the bargaining table as a place to improve their lots and their professional positions.

## D. Laws Vary Widely

An examination of the state laws which govern collective bargaining reveals that 25 states allow some form of collective bargaining by at least some segments of the management force. At one extreme is the Iowa bargaining law which clearly prohibits collective bargaining by defined supervisors. Pennsylvania's Public Employee Relations Act allows managers to participate only in "meet and confer" sessions, not in collective

bargaining. Although New York's Taylor Law does allow the exclusion of some managers from collective bargaining, in practice, most managers would be allowed to organize for the purpose of engaging in collective bargaining.

## E. The Private Sector Precedent

The experience of history has been that major interests of management representatives are different from and often conflict with, major interests of rank-and-file employees in the process of collective bargaining concerning wages, hours, and working conditions. In the private sector, where collective bargaining concerning wages, hours, and working conditions has arisen and become an established method of setting those wages, hours and working conditions, supervisors have been excluded from a unit which includes rank-and-file employees, and have been placed on the opposite side of the bargaining table from the representatives of the rank-and-file employees. The vast bulk of this historical experience has occurred in the private sector; that is, in private enterprise, as distinguished from the public sector--employees of various governmental entities. But the collective bargaining experience in private enterprise is far from being entirely private. From the very beginning, a substantial public interest in the collective bargaining process has been recognized and a substantial public stake in the outcome of that process and in the peaceful operation of that process has been recognized. Thus, the governmental authorities, its agents, state and federal, have from a very early period comprehensively regulated the collective bargaining process in the private sector, and, in fact, have made most of the major determinations of what is good policy and what is bad policy for the collective bargaining process.

The following is a selection of examples from this historical experience:

The basic federal law which governs the collective bargaining process of private industry in the United States is the Labor-Management Relations Act (Taft-Hartley Act). In this act, the term "supervisor" is defined as any individual having certain authority to take action or to effectively recommend certain actions, such as hiring, firing, transfers, etc. (discussed more fully below). Supervisors thus defined are excluded by the act from status as "employees" and are therefore excluded from any unit of employees for the purpose of collective bargaining.

Railcarriers and airlines are not covered by the Labor-Management Relations Act, but are covered for these purposes by the Railway Labor Act. This act also provides a statutory distinction between rank-and-file employees and employees with managerial attributes.

In the relatively new and rapidly developing labor relations in the public sector, a need for a similar distinction between employees and their supervisors is being discerned and implemented around the country.

A much fuller dissertation on the necessity of keeping supervisors out of employee units and on the side of management could, and with sufficient time should, be included for a fuller understanding of the public interest in handling the matter correctly. In a nutshell, the argument, and it is correct, is:

"It is in the public interest that government be run efficiently and without labor strife. Separating supervisors from their proper place on the management team and including them in a unit of employees whom they supervise leads to inefficient operations and to labor strife. Therefore, such handling of supervisors is contrary to the public interest."

## F. U.S. Supreme Court Rejects Bargaining by Managers

The most recent challenge to this concept was defeated when the U.S. Supreme Court clarified the law in terms of bargaining rights for managerial employees in the private sector. In the case of National Labor Relations Board v. Bell Aerospace Co., Textron, Inc., April 23, 1974, the U.S. Supreme Court ruled that all classifications of managerial employees or supervisors, regardless of how low they are in the hierarchy, cannot organize and bargain collectively. The court said, "Supervisors are management people, they have distinguished themselves in their work, they have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the "collective security" of the rank and file voluntarily because they believe the opportunities thus opened to them to be more valuable to them than such "security." It seems wrong and it is wrong to subject people of this kind who have demonstrated their initiative, their ambition and their ability to get ahead to the leveling processes of seniority, uniformity, and standardization, that the Supreme Court recognizes as being fundamental principles of unionism."

On July 30, 1970, the union, seeking to be certified as bargaining representative for 25 buyers employed by the company, requested the NLRB to order a representation election. The buyers purchased all of the company's supplies from outside vendors, and when other departments did not stipulate a particular supplier, the buyers were free to place any order up to $5,000 without the approval of a superior. In addition, a buyer served as chairman of the team which made purchase decisions for the project which represented 70 percent of the company's sales.

On the basis of these functions, the company contended that the buyers were "managerial employees," and therefore, were not covered by the National Labor Relations Act and had no right to participate in a labor organization in a separate bargaining unit. In addition, the company argued that unionization would create a potential conflict of interest since the buyers would be more receptive to bids from union contractors and would influence "make or buy" decisions in favor of creating additional work for sister unions.

The NLRB held that even though the buyers might be managerial employees, they were not excluded from the protection of the National Labor Relations Act since their work did not involve the formulation or implementation of labor relations policies, and Congress, in passing the Taft-Hartley Act, had intended to exclude only managerial employees whose duties and responsibilities would give rise to a conflict of interest. The Board dismissed the company's argument of potential conflict of interest as unsupported conjecture, holding that the company had sufficient authority to control any temptation of the buyers to give preferential treatment to union contractors.

The company stood by its position that the buyers were managerial employees and refused to bargain. When the Board, acting upon a petition from the union, found the company guilty of unlawful refusal to bargain and ordered it to bargain with the union, the company appealed to the courts, and the U.S. Supreme Court finally ruled in favor of the company, with the majority of the Court stating: "The Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals, all

point unmistakably to the conclusion that 'managerial employees' (those who formulate and effectuate management policies by expressing and making operative the decisions of their employers are not covered by the Act."

An examination of the most authoritative and widely-used criteria for determining whether an employee is part of management or not leads to the inescapable conclusion that government administrators are part and parcel of the management group which administers the laws of all states and localities.

The Taft-Hartley Act has set forth 12 powers which are supervisory in nature and denominates as a supervisor and management representative any employee who, in the use of his own independent judgment, can take or effectively recommend any one of them. They are the power to:

1. Hire
2. Transfer
3. Suspend
4. Lay Off
5. Recall
6. Promote
7. Discharge
8. Assign
9. Reward
10. Discipline
11. Responsibility Direct
12. Adjust Grievances

The National Labor Relations Board has developed a number of what are called "secondary tests" of supervisor status. Among those which would be directly analogous to the employer relationship in the private sector would be the following:

1. Job title, as indicating supervisory capability,
2. Whether regarded as such by self and others,
3. Privileges possessed only by other supervisors,

4. Attendance at meetings which are otherwise attended only by acknowledged supervisors,
5. Responsibility for a segment or area of overall operation,
6. Receiving direction from higher management rather than lower level supervisors,
7. Authority to transmit or interpret instructions from the employer to other employees,
8. The duty to evaluate the work of other employees,
9. The right and duty to instruct other employees,
10. Authority to grant or deny leaves of absence,
11. Responsibility for reporting infractions,
12. The keeping of time records on other employees,
13. Substantially greater pay not based solely on skill, and
14. Keeping own time records separate from time records kept for other employees.

Another guideline for determination of supervisory status of a given employee is the ratio of supervisors to other employees if the employee in question and all others like him are included in the supervisory group, compared with the same ratio if the employee in question and all others like him are included in the employee group.

## G. The Public Sector Situation

The Wisconsin Employment Relations Commission (which governs collective bargaining by public employees) established seven criteria in determining whether an individual is a supervisor (actually, these criteria, properly separated and listed, amount to ten individual criteria, but they are stated here as the Wisconsin Commission established them). They are as follows:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline, or discharge of employees,
2. The authority to direct and assign the workforce,
3. The number of employees supervised, and the number of other persons exercising greater, similar, or lesser authority over the same employee,
4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees,
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees,
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees, and
7. The amount of independent judgment and discretion exercised in the supervision of employees.

In determining whether or not a given government supervisor or administrator (or group thereof) should be classified as "management," both the primary and secondary tests should be applied. By doing so, the agency not only clarifies the proper roles of its employees, but enhances the power of the management force.

### H. Government Managers Have no Constitutional Right to Bargain

Generally speaking supervisors, administrators, executives, and other "management" personnel in the public sector have no constitutional right to be represented by a union for the purpose of collective bargaining. The right to engage in collective bargaining can only be obtained by

executive order or legislative action, and when such a right is given, the executive order or the law specifies whether or not managers may be represented by the same union which represents rank and file employees. For example, in the case of collective bargaining in the federal government, all managers are denied collective bargaining rights by the applicable Executive Order 11491. As far as state and local bargaining is concerned, the state's bargaining law usually specifies whether or not managers can be represented by the same union which represents rank and file employees. Where no bargaining law exists, the unit determination of managers is somewhat unclear. Although in 1975 a federal court in Illinois ruled that a Chicago suburb could prohibit firefighters of officer rank from joining the same union as non-commissioned firefighters,[2] another federal court in Florida in 1969 held unconstitutional a law which prevented school administrators from belonging to the same union as classroom teachers.[3] Irrespective of these somewhat conflicting court cases, however, all public employers are well advised to prohibit managers from collective bargaining where such a prohibition is legal. And where managers are entitled to bargain by law, they should be prohibited from being represented by the same union which represents rank and file employees, unless there is some specific legal prohibition against such a position.

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[2]Elk Grove Firefighters, Local No. 2340 v. Willis, 400 F. Supp. 1097 (N.D. Ill. 1975).

[3]Orr v. Thorp, 308 F. Supp. 1369 (S.D. Fla. 1969).

## I. Managers Should Not Bargain

In summary, government managers should not engage in collective bargaining for the following reasons:

1. Collective bargaining sharpens the distinction between managers and other employees,
2. Managers comprise the executive arm of the legislative body. Their loyalty is undermined when they are represented by a bargaining agent controlled by or in sympathy with rank-and-file employees,
3. Managers must implement the negotiated agreement, which is a conflict of interest if the administrators are in the same unit with other employees, or represented by a brotherhood union,
4. Managers process grievances, which is a conflict of interest if administrators are in the same unit with other employees represented by a labor agent,
5. The presence of rank-and-file employees in the bargaining unit with managers weakens the managerial power of managers,
6. There is ample precedent in labor relations for removal of managers from employee bargaining units, specifically, and bargaining, generally,
7. Managers must represent the public interest in time of strife, which is a potential conflict of interest if managers are loyal to the union philosophy and discipline.

Although many individual government administrators and associations of government administrators have varying opinions on the subject of collective bargaining rights, some public sector managerial organizations have adopted clear positions on the issue. For example, the American Association of School Administrators passed a resolution at its 1978

convention which stated that management personnel "should not be part of any formal bargaining unit."[4]

Following the example of the private sector, the federal government for 20 years has taken a formal position that federal management personnel are not to engage in collective bargaining.

President Kennedy's Executive Order 10988 of 1962, the original federal government labor relations ordinance, included supervisors in the definition of employees covered by the order.

President Johnson created in 1966 a President's Review Committee on Federal Employee-Management Relations. This committee, chaired by Labor Secretary Willard Wirtz, issued its final report in January 1969. It recommended, among other things, that supervisors be regarded as management and excluded from bargaining.

A later study committee in an August 1969 report made the same recommendation.[5] This resulted in the issuance in October 1969 of Executive Order 11491 which reversed the position on supervisor bargaining. A later revision, Executive Order 11838, issued in February 1975, retained this revision.

There is also a considerable body of opinion to exclude supervisors from bargaining. This view is shared by proponents, as well as opponents, of public sector collective bargaining.

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[4]Education U.S.A. (Washington, D.C.), Vol. 21, No. 26, p. 193.

[5]Study Committee Report and Recommendations, August 1969, Which Led to the Issuance of Executive Order 11491 (Washington, D.C.: Federal Labor Relations Council), p. 6.

Professors Harry Wellington and Ralph K. Winter, Jr. of Yale, who are noted authorities in this field, oppose bargaining by managers. In their Brookings Institution study, they state:

> . . . the case for excluding supervisory employees . . . from the collective bargaining law is overwhelming. Municipalities are frequently not well organized for collective bargaining and never will be if they cannot create positions with effective responsibility for the administration of collective agreements. Such positions must necessarily be filled by persons who identify with, and are part of, management, not by those who are unionized, whether or not the union is exclusively supervisor.[6]

Professor David Lewin, of Columbia University, has stated similar concern. He notes that there exists a tendency for public managers to identify with and often support the bargaining goals of rank-and-file employees. This distorts the labor relations balance by contributing to the union's bargaining power at the expense of governments. His recommendation:

> One important reform would be to amend public sector labor relations statutes to withdraw from supervisors and managers union representation and bargaining rights.[7]

A study by Hayford and Sinicropi also examined this problem. As labor relations programs develop and as the private sector experience has shown, supervisors become management's front line troops in contact administration and grievance adjustment. Supervisors who bargain collectively develop a community of interest with the employees they supervise. Therefore, the managers feel a "role ambivalence" that

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[6]Harry H. Wellington and Ralph K. Winter, Jr., The Unions and the Cities (Washington, D.C.: The Brookings Institution, 1971), pp. 113-14.

[7]David Lewin, "Collective Bargaining and the Right to Strike," in Public Employee Unions: A Study of the Crisis in Public Sector Labor Relations (San Francisco: Institute for Contemporary Studies, 1976), p. 157.

impairs their functioning as a contract administrator.[8] The authors recommend:

> . . . it is our feeling that an effective statutory structure must provide that true bona fide supervisors be excluded from statutory bargaining rights protection. The heart of a viable labor relations structure lies in effective contract administration. It is a widely accepted fact that in mature bargaining relationships, the key person in day-to-day contract administration is the front line supervisor. The formidable problems inherent in weakening that first line of management-labor communication and cooperation by allowing such individuals to bargain collectively are apparent.[9]

### J. Managers Should be Backed by Management Rights

As stated earlier in this chapter, managers should be denied the right to engage in collective bargaining. It was further noted that managers can be identified by applying certain primary and secondary tests. The credibility of these tests is rooted in the inherent nature of management. If managers are to manage the agency, they must have certain fundamental rights. Without these rights, the agency cannot achieve its objectives. These fundamental rights which management must retain are the right to:

1. Discipline employees
2. Dismiss employees
3. Promote worthy employees
4. Demote unworthy employees
5. Assign and transfer employees
6. Reward with merit salary increases
7. Assign overtime work

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[8]Stephen L. Hayford and Anthony V. Sinicropi, "Bargaining Rights Status of Public Sector Supervisors," Industrial Relations, 15 February, p. 60.

[9]Id. at p. 61.

8. Schedule agency operations
9. Control production standards
10. Make justified technological changes
11. Reduce spoiled work
12. Assign foremen to production work
13. Contract out
14. Schedule leaves of absence
15. Uninterrupted work
16. Cooperation from the union
17. Adopt inherent managerial policies
18. Control the agency's overall budget
19. Determine the agency's functions and programs, and
20. Determine the agency's organization structure

Each of these rights shall now be addressed individually.

1. The right to discipline and discharge employees. Although employees should be entitled to retain their jobs on the basis of good behavior, efficiency, honesty, and availability of funds, the public agency must retain the right to discipline or discharge an employee for justifiable cause. For example, the agency management must be free to discipline or discharge employees for using intoxicating liquors during working hours, violation of safety rules, absence without leave, excessive absenteeism, dishonesty, insubordination, habitual neglect of duties, carelessness resulting in damage to agency property, sleeping while on duty, and similar just causes. Without the right to discipline or terminate employees for such cause, the public agency would be forced to keep employees on the payroll who are not only not worthy of their pay, but who might actually be harmful to the agency.

2. The right to promote and demote employees. One important function of management is to place worthy employees in promotional positions and remove unworthy employees where needed. In order to implement this function, managers must have overall freedom to make the final decision and to promote and demote employees. Failure to retain such a right would quickly result in a deterioration in the integrity of the workforce. Any attempt to share the right to promote and demote with the union inevitably results in a loss of management initiative, and without unencumbered management initiative, the agency's operation is seriously damaged.

3. The right to assign and transfer employees. Transfer of workers are not easy matters to handle. Employee transfers involve important psychological factors, in that old habits must be changed, new environments must be overcome, along with many other personal adjustments. Consequently, employees often attempt to place restrictions on management's freedom to make employee transfers, especially involuntary transfers. However, such efforts by the union must be resisted effectively; otherwise, the right employee will not be in the right job, a condition which would soon lead to a diminution in the quantity and quality of production

4. The right to reward with merit salary increases. In 1948, the U.S. Supreme Court ruled that private sector employees are required to bargain with the recognized union on the subject of merit wage increases. This ruling, however, has not turned out to mean that employers have lost all rights to award merit wage increases to employees. By the use of certain creative safeguards, the union can usually be talked into allowing management to award merit increases under reasonable conditions.

Although the 1948 U.S. Supreme Court decision is not applicable to public sector collective bargaining, it does represent an attitude and a condition which does exist in some public sector situations. Therefore, management should be aware that its attempts to award merit increases will likely be challenged by the union. Nevertheless, a public agency should make every effort to retain its freedom to make special salary awards to deserving workers, since such incentives contribute to the overall improvement of production.

5. The right to assign overtime work. Few agencies can get their work done by guaranteeing that all employees will never be required to work outside of the normal workday. Inevitable exigencies do arise which require that some employees work outside of their normal work hours. Failure to retain the right to assign employees to overtime in such instances results in needed work being left undone. Although management might need to agree to certain safeguards to the possible abuse in the assignment of overtime, some reasonable concessions can be justified in order to retain the right to assign overtime.

6. The right to schedule operations. A government agency or a school district achieves its objectives primarily through a process of scheduling operations vital to the jurisdiction. Failure to retain the rights and powers necessary to schedule such operations results in a major failure of the organization. Therefore, management must take many steps in many areas of labor relations, personnel administration, and fiscal management to assure that nothing interferes with the freedom to schedule agency activities. Although the union can usually be counted on to resist any such action which interferes with the wishes and convenience of the union and its organized employees, this fact should

not deter management from persisting in its efforts to manage the affairs of the agency.

7. The right to control production and service standards. In 1949, the employees of the Ford Motor Company went on strike because the union claimed that it was "inhuman" to speed up the assembly line to 105 percent of its normal speed. That strike serves as an example of how employees, especially those in assembly-line type jobs, view attempts to increase production and improve standards as a threat to their working conditions. Although most school districts and government agencies do not run assembly-line operations, there still exists the possibility that the local union will resist any production change which has impact on the workers' employment conditions. Although most public employers can expect to retain their right to control production standards, many government agencies have found that they must negotiate additional benefits as compensation for any increased work caused by the change in production standards.

8. The right to make technological changes. The high standard of living which we enjoy generally in the United States is attributable to the use of machine power instead of manpower. The introduction of robots and high speed computers should provide even more hope for improved standards of living. However, the introduction of improved technology into any agency can be negated by the attitude of the employees and the resistance of the union. Unfortunately, some employees view improved technology at the work site as a threat to their job security. Like it or not, most private companies and public agencies must face this fact of life. Even though improved technology may be good for the employer and good for the consumer or taxpayer, it often cannot be introduced

effortlessly if the new technology threatens employees with the loss of their jobs. Therefore, in most instances where collective bargaining exists, the employer must be prepared to deal with the problem of employees displaced by improved technology.

This is not to suggest that improved technology should be avoided wherever it poses a threat to the union and its members. To the contrary, all public agencies have an obligation to find ways to deliver public services to taxpayers at the lowest possible price. In carrying out this obligation, however, the employer must find some reasonable way to provide for the welfare of its employees.

9. The right to reduce spoiled work. If a private company is to survive its competition, it must eliminate to the extent possible all spoiled work. Although the term "spoiled work" is usually used in private industry settings, the counterpart to that term in the public sector is "unsatisfactory service." Taxpayers have a right to expect and receive satisfactory service in return for the payment of their hard-earned tax dollars to their government. If a school board, county board, and other elected government officials expect to stay in office, they must maintain a satisfactory level of public services. In order to maintain quality services to the public, the managers of the public agency must retain an unencumbered power to correct situations which cause poor service to the taxpayers.

In one situation familiar to the author, the trash of the community was collected by the local sanitation department. Soon after the unionization of the trash collectors, however, homeowners began to experience a number of problems, all of which cannot be discussed here. One problem, however, was that the trash collectors would throw trash cans

back onto the homeowners' property after the cans had been emptied, often damaging the cans and making considerable noise. Since trash collections started very early in the morning, many residents were awakened by the noise of the trash collectors. When the matter came to the attention of the governing body, and then to the labor relations director, a statement was made that the labor contract prevented management from correcting the situation without bargaining with the union! Obviously, whoever negotiated that contract for that municipality had never heard of the need to retain the power to reduce unsatisfactory service.

10. The right to assign foremen to production work. In the absence of a labor contract provision to the contrary, most private and public employers have the right to assign production work to foremen from time to time. Once a labor contract is in force, however, there is a general principle that any substantial transfer of bargaining unit duties to a nonunion foreman (or supervisor) would be a violation of the union contract, in that such transfers pose a threat to the livelihood of the workers. Therefore, before collective bargaining is entered into with employees, the employer should have a firm policy allowing for supervisors to perform production work. If no such policy exists prior to such negotiations, the employer's right to assign production work to foremen will likely be lost.

11. The right to contract out. In both the private and public sectors, an employer usually has the right to contract company or agency work to outside jobbers. Quite often, however, unions will attempt to negotiate a "no subcontracting" clause, since subcontracting (or contracting out) constitutes a possible loss of bargaining unit jobs.

Although unions generally resist contracting out of bargaining unit jobs, the employer should persist in contracting out any job which can be done on a more cost-efficient basis than can be done by agent employees. Although the employer may need to make some compromises on tertiary matters related to contracting out, the employer should not compromise the overriding right to get work done on the most cost-efficient basis possible.

12. The right to schedule leaves of absence. Within reasonable limits, an employer should retain the right to determine acceptable absences and schedule absences from work. Naturally, some leaves of absence are expected in most jobs, such as sick leave, and of course sick leave is not under the scheduling control of management. However, many leaves of absence, such as personal leave, annual leave, education leave, etc., are at the discretion of the employer and can be somewhat scheduled by the employer.

The main point being made here is that unless on a leave of absence approved by the employer, all employees are needed on the job. In order to assure that employees are on the job when they are supposed to be, the employer must retain the right to deny leave (for cause) and to schedule leave in order to provide minimal interruption to the work flow.

13. The right to uninterrupted work. When an employer, public or private, enters into a contract with a labor union, the contract always contains a number of guaranteed benefits and "working conditions." In return for these rewards, the employer is entitled to uninterrupted labor peace. In other words, a labor contract should assure that there will be no strikes during the life of the agreement or other concerted acts designed as bargaining tactics which interfere with the normal operations

of the employer. Without a guarantee from the union that contracts guarantee labor peace, there should be no labor contract.

This rule is especially applicable in the public sector where government provides monopolistic services. How can a local government tolerate a strike by policemen when there is no other service available to protect citizens? Because most government services are monopolistic and because many government services are vital to citizens, no labor contract should be signed without a no-strike guarantee.

14. The right to cooperation from the union. Once the parties have agreed to a contract governing compensation, benefits and working conditions, the employer should expect cooperation from the union. Such cooperation can take many forms, e.g.:

(a) The union should not participate in any overt or covert actions designed to interfere with the normal operations of the agency.

(b) The union should cooperate in forming joint labor-management committees where needed.

(c) The union should cooperate with management in the support of approved charitable causes.

15. The right to adopt inherent managerial policies. Every government agency has a primary mission. School districts are supposed to deliver an education to young people. Policemen are supposed to protect law-abiding citizens from criminals. Trash collectors are supposed to collect trash. Postmen are supposed to deliver mail. No labor contract should contain any provision which inhibits the agency from performing its assigned tasks; and no union should expect to negotiate terms which interfere with these assigned tasks. The purpose of a public agency is

to deliver assigned services; whereas, the function of the union is to negotiate rewards given to the employees who deliver these services. Unfortunately, some unions and some employers seem to forget their proper roles.

16. The right to control the agency's overall budget. Although a public employer can be reasonably expected to negotiate on matters which cost money, such as salaries, uniforms, medical insurance, mileage reimbursements, etc., the agency should not negotiate actual line items in the budget. The actual preparation of the budget should remain the function of management. The process of collective bargaining is simply one process being used by management to develop its budget.

17. The right to determine the agency's programs and functions. As stated in item number 15 above, all government agencies have assigned missions. In order to accomplish these missions, the agency must be free to select its own programs and functions. For example, if a school district is to deliver education to young people, the school district must be free to decide what courses shall be offered, what instructional materials will be used, what type of employees are needed, and how students shall be evaluated. Absent such powers, a school district would be unable to achieve its overriding purpose in the community.

18. The right to determine the agency's organizational structure. If a government agency is to deliver its services, it must have control over the form and structure of its own organization. Agencies must be free to set their own organizational chart, to determine what office performs what functions, to locate proper worksites, and to establish all necessary internal infrastructures necessary to get the job done.

In order to provide a foundation for managers to function as managers, the labor contract should contain a "management rights" clause. Although not all experts agree to this advice, because such experts claim that governments are sovereign and do not need such clauses, the author does not agree, based on his experiences in many situations where the absence of a management rights clause was harmful and its presence was helpful.

Although some advocates of the use of management rights clauses in the public sector are comfortable with a short clause, such as:

"The governing body shall retain all legal powers to carry out its functions, unless provided otherwise in this agreement,"

the author is convinced that a more comprehensive clause is needed. Following is an example of an acceptable clause used by a school district.

MANAGEMENT RIGHTS

"The school board, on its own behalf and on behalf of the electors of the district, hereby retains and reserves unto itself, without limitation, all powers, rights authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State and the United States, including but without limiting the generality of the foregoing, the right:

"1. To the executive management and administrative control of the school system and its properties and facilities;

"2. To hire all employees and, subject to the provisions of law, to determine their qualifications, and the conditions for their continued employment, or their dismissal or demotion; and to promote, and transfer all such employees;

"3. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students, all as deemed necessary or advisable by the Board;

"4. To decide upon the means and methods of instruction, the selection of textbooks and other teaching aids of every kind and nature; and

"5. To determine class schedules, school hours, and the duties and responsibilities and assignments of teachers and other employees with respect thereto, and non-teaching activities.

"The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the express and specific terms of this Agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the United States.

"Nothing contained herein shall be considered to deny or restrict the Board of its rights, responsibilities, and authority under the state school laws or any other national, state, county, district or local laws or regulations as they pertain to education."

## VIII. BEFORE NEGOTIATIONS BEGIN

Negotiations at the bargaining table is only one aspect of a total labor relations program, albeit a very important aspect. This section will not attempt to deal in great detail with the strategies and tactics of negotiations. Two other books by the author, Bargaining Tactics and Negotiations Strategies, contain over 500 suggestions for the actual conduct of labor negotiations. Those readers who want to know more about these topics should consult these two books.

For purposes of this section, we will look at the negotiations process from the standpoint of what must take place just prior to negotiations and then we will look at some imperative rules which should be followed during actual negotiations.

### A. Before Negotiations Begin

Before negotiations actually begin, a number of preparatory steps should be taken, among which are:

1. Prepare a strike plan
2. Establish negotiations goals
3. Get clear authority
4. Anticipate union tactics
5. Organize a negotiations team
6. Know the bargaining law

#### 1. Prepare a strike plan

No government agency should enter into a collective bargaining relationship with its employees without a contingency plan to keep the agency

operating should the employees go on strike. A strike plan possesses several advantages, among which are:

a. A strike plan provides a foundation of confidence for management to conduct its labor negotiations. By knowing that it has a contingency plan to follow should the employees inflict their most powerful blow, management can meet its adversary at the bargaining table free of fear. This sense of security is very important, in that fear can cause either party to take unwarranted action. Fear can cause either party to make an unreasonable concession, and fear can cause either party to overreact and take unnecessary and excessive aggressive measures. The gnawing fear that the union will go on strike creates an impedence to free-flowing attempts to find reasonable solutions to reasonable problems.

b. A second strike plan can succeed in keeping the government agency operating, even if at a minimal level. By keeping the agency open and operating, essential and unique services continue to be available to the public. Furthermore, by keeping the agency operating, management has taken the single most effective step it could take to bring the employees back to their jobs. After all, the ultimate weapon of the union to get its way is to create an intense political pressure on the governing body to capitulate to the union demands. This pressure can be generated best by removing essential and monopolistic services from the public. If the agency, however, continues to provide services to the public, there is

no political pressure generated. That's why a government agency should go to almost any extreme to keep the agency operating.

c. A strike plan serves notice to the union that management will not be intimidated by strikes or threats of strikes. Although a strike plan and its details should be kept confidential, the union seems to always find out that some such plan does exist. This revelation will tend to discourage the union from relying on a strike (or strike threats) as a tactic in its negotiations strategy.

Although strikes by public employees are not always the most potent weapon they have, strikes are always the last resort in the union's arsenal of weapons. Strikes should be avoided by both parties, since they seldom solve any problem--but they should not be avoided at any cost. There have been instances when, in the view of the author, no reasonable action by management could have headed off a strike. In such cases, the only advice to management is "batten down the hatches," hire as many strike breakers as needed, and outmaneuver the union.

As stated at the outset of this section, no competent union is going to signal its strategy to the opponent in advance. Therefore, the union can be expected to threaten to strike (remember, the threat is more effective than the actual act), but not to announce it when the decision is made to go on strike. Therefore, management must be perceptive from the beginning of negotiations and carefully log and analyze each strike indicator as it appears. By identifying each strike indicator, and analyzing its cause, management has taken the most important precaution in avoiding a strike.

## The Strike Plan

Although the subject of what to do in the event of a strike has been covered in another book by the author, a few suggestions should be made here:

a. No public employer should enter into collective bargaining with an employee organization without a strike plan. The governing bodies of all public agencies have a legal and moral obligation to make every reasonable effort to assure that the government service which has been entrusted to their care is carried out without interruption. Most government services are monopolistic and the persons served by the agency have no other source of that service.

   A comprehensive strike plan has a dual advantage in that it will both discourage the union from striking, and, should the union strike anyway, the agency will be prepared to operate at least at the emergency level.

b. The strike plan should be based on a commitment to keep the agency operating during a strike. Although in the early days of collective bargaining in the public sector there was a tendency to throw in the towel during a strike, there has been a gradual acceptance of the advice of the author to take whatever action is necessary to keep the agency operating at the maximum level possible. Although there is still not universal acceptance of this advice, it remains the most appropriate response to a strike.

   Keeping the agency operating, even at a minimal level during the strike, has three advantages:

(1) The citizens continue to be served,

(2) The union's primary strike leverage is greatly reduced, if not destroyed, and

(3) The union will be less likely to strike in the future.

Exactly what to do to assure that the agency continues to operate during a strike will be examined in a book to be released later by the author.

c. Identify and analyze the tell-tale signs of a strike. Strikes are seldom announced in advance, and surprise strikes can be a serious disadvantage to the employer. Therefore, management should not ignore any of the strike indicators discussed earlier in this section.

d. Control the negotiations process on critical issues. Although there have been a few strikes caused by issues not under negotiations, most strikes concern issues under consideration at the bargaining table. In any union list of proposals there are both critical and strike issues; that is, some issues are important, but the union will not strike over them. A competent management negotiator knows what the strike issues are and finds some way to diffuse them. The job of a management negotiator is to find acceptable ways to avoid strikes rather than be a part of the problem that causes the strike.

e. When a strike is imminent, the employer's last position at the bargaining table should be one that does not offend the public's sensibilities. As discussed previously, a strike is a struggle between the governing body of the agency and the agency union to

determine which party shall be supported by the public. When a strike is imminent, negotiations have broken down, and disputes are being aired in the public area, management should be certain that its position on all remaining issues is reasonable. Otherwise, the public may blame the employer for the strike and exert pressure to settle on union terms. However, the reader is reminded of the caveat offered earlier. *Save a little something as a face-saving device to bring the employees back to work.*

f. Be prepared to endure an indefinite strike. To date, every public sector strike in America has eventually come to an end. Although a minority of strikes have lasted for more than a month, the vast majority of strikes last a few days. Despite this fact, however, the wise employer prepares a strike plan which prepares the agency to hold out *forever*!

2. **Establish negotiating goals**

From the standpoint of management, the collective bargaining process should serve a number of major purposes, among which are the following:

a. "Reasonable" employee compensation, benefits and working conditions. What management considers reasonable and what it actually settles for may be two different matters, however. Generally speaking, management will view "reasonable" benefits as those which are necessary to attract and retain the quality of employee needed by the agency. In other words, management should generally go by market conditions.

What is reasonable is also influenced by what can be afforded. Government is different from private companies in a number of

ways, as explained elsewhere in this book. Government does not operate on a profit basis, and the source of its income is not very elastic. Therefore, what is reasonable compensation is often determined by the fixed supply of tax revenues.

b. A good day's work from each employee. Management will normally try to protect its position that it expects a full day of quality labor from each employee. Consequently, the union can expect resistance on any proposal which might diminish the amount of quality of work from employees.

c. Retention of its sovereign powers. School boards, city councils, and other similar legislative bodies will not give up easily their right and obligations to deliver services to the public. Therefore, the legislative body must negotiate a labor contract which does not erode its sovereign powers.

d. Retention of its right to direct the workforce. This issue has been discussed at some length earlier in this book under the topic of the scope of bargaining. Nevertheless, it should be reiterated here that management can be expected to negotiate seriously at the bargaining table in order to retain its power to give direction to its employees.

e. Peaceful and constructive employee relations. Through the collective bargaining process, the legislative body will hope to achieve a productive relationship with its employees. After all, this is the major purpose of collective bargaining. Management has every right to expect that once an agreement is reached, and that once a grievance procedure is agreed to, the employees will commit themselves to their work and to the directions of their supervisors.

3. Get clear authority

Effective negotiations require that each negotiator have the authority to reach an eventual tentative agreement which he will recommend to his principals. Anything less simply forces the negotiations process to by-pass the negotiators. Should this be the case, there would be no need to identify negotiators for either side. Under such a situation, it is likely that no agreement would ever be reached.

Most experienced and professional negotiators prefer to have *general* rather than specific direction from their constituents. A negotiator's hands are tied if he is under specific instructions for each issue to be negotiated. The very nature of labor negotiations requires that each party be somewhat flexible in order to compromise and make adjustments to reach an accommodation. Many unions who have implicit trust in their spokesman simply give instructions to "get the best deal possible." Many employers instruct their negotiator to do the same. However, because of the sovereignty factor (discussed elsewhere in this book), a governing body of a governmental unit is more likely to be specific with its negotiator than is the case with the union.

However, it is not uncommon for a governing body to generalize its directions to its chief spokesman at the bargaining table. Sometimes it will instruct the negotiator to:

. Stay within the total amount of money authorized

. Protect the policy-making powers of the governing body

. Assure a good day's work for a good day's pay

. Protect the right of the executive branch to direct the work-force, and

. Assure that the labor contract will provide a reasonable degree of labor peace

Given such general directions as these, an experienced and competent negotiator can move ahead and bring back an agreement which, in most cases, should be approved by the governing body.

As stated earlier, negotiations is an *executive* function. The policy makers who make the final decision regarding the labor contract should not be personally involved in the bargaining process. Under this concept, each negotiating team is given certain guidelines by its governing body. Each team is then free to negotiate within these guidelines. If no agreement can be reached within these parameters, then the teams must go back to their principals for further direction.

Although each negotiator should view his or her opposite as being the chief and exclusive spokesman for that group, with full authority to enter into an agreement, there are times when it is to the advantage of the negotiator not to have full authority. The absence of authority to enter into an agreement on certain issues provides time and opportunity to analyze certain situations. By the same token, the absence of complete authority for the negotiator is of advantage to the governing bodies of both sides. Withholding some authority forces critical issues to come back to the governing bodies for consideration. Such practice not only provides needed flexibility, but also provides protection against unreasonable or unacceptable concessions.

Labor negotiations is a process whereby representatives of employees meet with the representatives of the employer in order to reach an agreement on employee relations. In order for the process to work, both parties must have an exclusive spokesperson with the power and authority

to enter into a tentative agreement. If either party lacks such a spokesperson, the process of negotiations becomes a farce. Although this is a common problem with groups new to labor negotiations, it is a flaw that cannot be tolerated for any protracted period of time.

When such a flaw is faced in negotiations, it is sometimes necessary to chide the adversary for the failure to be fully clothed in all necessary authority to negotiate. In some extreme cases, it may be advisable to communicate directly with his principals in order to be sure that the complaint is clearly registered.

The rule that both negotiators must have the power to negotiate is so basic that it is sometimes overlooked. The city council or union that sends a negotiator to do an errand boy's job is asking for deserved chaos. The negotiations process simply cannot function unless each negotiator has the total wherewithal necessary to reach a tentative agreement which can be recommended for ratification.

4. Anticipate union tactics

Labor negotiations are not always a gentlemanly process of labor and management presenting their respective proposals and counter-proposals, resulting in an attempt to achieve an amicable and mutual accommodation. Sometimes tactics are used other than persuasion through the presentation of facts. Sometimes tactics are employed to generate fear and discomfort in an effort to cause the opposing party to take action which otherwise might not be taken.

In dealing with pressure tactics, two fundamental rules should be noted:

a. Fear is used as a negotiations tactic in lieu of taking actual adverse action. Fear is a more useful tactic, in that it is

often more effective than the actual act and is always less expensive than the actual act. For example, the threat of scattered use of sick leave is more likely to induce management to take action desired by the union than the actual implementation of scattered use of sick leave. Whereas the threat of scattered use of sick leave conjures up all sorts of terrible consequences (the imagination does wonders when frightened), the actual use of scattered sick leave would likely be handled routinely by management. Certainly, the threat of such an act is less expensive to the union than the actual act itself.

b. Assuming a reasonable and fair position has been taken in negotiations, there should be no capitulation as the result of harmful acts or the threat of harmful acts. To capitulate under such conditions would teach the opponent that threats and hostile acts are a legitimate part of labor negotiations.

With these rules in mind, here are some of the pressure tactics used by unions and what can be done about them.

a. The use of end-runs. Occasionally, the spokesman for the union will attempt to negotiate with persons other than the counterpart on the management team. This tactic is usually used to force the management spokesman to make a concession which he would not make otherwise. Attempts to bypass the opposing negotiator are often referred to as "end-runs." In the public sector there are many end-runs which a union might attempt:

(1) There are end-runs to the governing body. Such end-runs are usually accomplished by simultaneous communication to all members of the governing body, through the use of the mail service or by telephone, or by representatives of the union appearing before an official meeting of the governing body. This approach is used to convince the governing body that it should instruct its negotiator to change his position. In such cases, the governing body should simply refer such matters back to the bargaining table, and then quietly investigate to determine if there should be a change in directions given to the negotiator.

(2) There are end-runs to individual members of the governing body. Usually, this occurs when the union has an ally on the governing body or where there is a "weak sister" on the governing council. Such contacts are made in order to disunite the governing body, since a divided governing body can be manipulated more easily than one that is strongly united.

(3) There are end-runs to the chief executive of the agency. Such contacts are made in order to undermine the support of management's chief negotiator. By instilling doubt in the mind of the chief executive, the first step has been taken to erode the strength of management's spokesman in labor relations. Although chief executives generally should refuse to speak with the union about negotiable topics, there are times when there may be no choice. In such situations, the chief executive (or superintendent of

schools) should listen to the union and then discuss the matter privately with the management negotiator. However, the chief executive always should make it clear that the chief spokesman speaks for the agency.

(4) End-runs are made to the specific clientele served by the agency. For example, public school teachers frequently attempt to contact parents during the process of negotiations in order to induce the parents to contact the school board. This tactic is designed to result in the school board advising the superintendent to give new directions to the negotiations through instructions to the chief negotiator. When such end-runs are used by the union, the governing body should attempt to make clear the fact that all negotiations take place between the authorized parties. If the situation warrants further action, however, the governing body should respond with appropriate counter measures.

(5) There are end-runs to the public at large. These end-runs are designed to generate public support for a position taken by the union. To the extent possible, such actions should be prohibited by mutual agreement prior to the beginning of negotiations. Where this has not been the case, management should determine to what extent and in what fashion such public relations campaigns by the union should be countered.

(6) There are end-runs to specific members of the management team. For example, it is not uncommon for union members to

attempt to influence their job supervisors during negotiations. To minimize any harm which might come from such potential acts, management should:

(a) Inform all members of the management team that they are not to engage in conversation with employees on matters under negotiations, and

(b) Have a prior understanding with the union that such tactics will not be engaged in.

b. Picketing. Frequently during negotiations or during a strike, members of the union will station themselves outside of the workplace, particularly the central workplace, and often carrying signs, to demonstrate, to protest, or to keep nonunion members from entering the workplace--and to generally intimidate management into taking some action desired by the union. Picketing is a common occurrence in collective bargaining, and should not cause overreaction. Although there are many forms of picketing and no one management response is appropriate, certain actions should be taken during picketing:

(1) The police should be alerted that picketing is taking place, since picket lines can sometimes create disturbances and interfere with the rights of the public and non-picketers,

(2) The right of entry and egress to agency premises must be kept open and safe,

(3) Management team members should not attempt to communicate with employees on the picket line regarding matters under negotiations,

(4) Nonpicketing employees should be encouraged to have no contact with those on the picket line,

(5) All illegal acts should be noted and reported to the appropriate authorities.

c. Slowdowns. A well-disciplined union is able to use the tactic of escalated force during negotiations. This is an orderly process of escalated threats and hostile acts until an objective is achieved. For example, many unions are hesitant to engage in a strike for many obvious reasons. Frequently, the use of lesser force is preferable, such as a concerted slowdown at the worksite. Such a tactic is designed to intimidate and harm the employer while posing little threat or harm to the employees. In slowdowns, a wise union will usually advise its members as to how to lessen their work, but within agency permissible limits. In other words, employees are advised to "work to the rule," and no more. This tactic deprives the employer of vital services which employees regularly give beyond the actual requirement of the job, and causes confusion on the job. It is the union's hope that the tactic will result in management making a concession at the bargaining table. Incidentally, the opposite of a "slowdown" is a "speed-up." Police unions have made this tactic well-known by encouraging officers to issue as many traffic tickets as legally possible.

Although no one rule should be followed in responding to slowdowns, the following suggestions apply generally:

(1) If the slowdown is not causing serious harm, it should be ignored,

(2) If the slowdown is resulting in violation of agency rules, appropriate disciplinary actions should be taken,

(3) If the slowdown is inflicting harm on the agency, but no violation of any rule has taken place, the agency should undertake appropriate negotiations and/or employee relations strategy to correct the situation.

d. Charges of unfair labor practices. In the experience of the author, most union allegations of unfair labor practices are only threats designed to intimidate the employer into making some concession. Even when such charges are actually filed, most of them are resolved before a hearing is held or an order is issued. And even when a hearing is held on a charge and a decision is made, management has a better than 50 percent chance to win. But even if management loses the case, the worst solution is usually to stop something that management can afford to stop.

More about this topic is discussed in the section dealing with unfair labor practices. Therefore, for purposes of brevity, suffice it to suggest that certain points should be noted when faced with a charge of unfair labor practices:

(1) The charge is usually only a threat, and should be dealt with as such.

(2) Get expert advice from an attorney or competent consultant, if necessary.

(3) If convinced that you are innocent, do not concede.

(4) Find an unfair labor practice being committed by the union and charge the union with committing an unfair labor practice. If such an unfair practice cannot be found, get tough at the bargaining table.

(5) If management does not want to negotiate on a certain issue and considers that issue a nonmandatory topic, management should refuse to bargain. If charged with an unfair labor practice, management should take its case to the appropriate reviewing body and give its best defense.

e. Walkouts. One of the many steps included in the use of "escalated force" is the "walkout." A walkout occurs when the union negotiations team abruptly exits from the negotiations room upon a prearranged signal. The tactic is used to imply to management that the union team is so irritated that it can no longer face the management team and must therefore terminate negotiations to find a more effective way to convince management to accept certain union demands. To the novice management team, the first such experience with a walkout usually leaves the management team stunned and disoriented, and therefore vulnerable to making unwise concessions.

Under normal circumstances a walkout is something to be tolerated. The best approach is to be sure that the union is informed prior to leaving the room that management is willing to remain for further discussion. The next day, or soon thereafter, the union

should be communicated with by expressing a willingness to continue with negotiations. Sometimes a small "face saving" gesture can be made to entice the union to return. For specific suggestions on how to deal with such a tactic, see the section which discusses how to deal with temporary deadlocks.

f. Marathon Meetings. A popular but mythical view of labor negotiations envisions several 24-hour meetings. Some unions do try to engage management in marathon meetings with the hope that fatigue will bring about an increased inclination of the management team to make concessions wanted by the union. The tactic does work occasionally, and management should be aware of the purpose of such marathon meetings.

The best way to avoid marathon meetings is to establish a mutually agreeable schedule of meetings of a specified duration, allowing sufficient time to conduct reasonable negotiations on all issues. Should a marathon meeting become necessary despite such planning, the management team should be aware of the pitfalls of such meetings and prepare accordingly. Should the management team find itself being pressured into trying to resolve an issue before it is ready, every effort should be made to table that issue until a later date. Should some immutable deadline be faced with insufficient time available to reach a total agreement free of intimidating pressure, it might be better for the unresolved issues to be dealt with through an appropriate impasse procedure.

g. Frequent Meetings. One tactic employed by unions involves engaging management in frequent negotiations sessions far in excess of what good faith bargaining would call for. The purpose of engaging management in an excess number of meetings is to create a psychological attitude on the part of management team members which makes them vulnerable to allowing concessions sought by the union. Frequent and prolonged meetings can tire participants, weakening their will to resist tempting concessions, and causing a general disorientation which can lead to errors in judgment at the bargaining table.

h. Temper Tantrums. Eventually, each negotiator will encounter a negotiations session where the opposing spokesman displays excessive temper. Although such displays are sometimes a sincere expression of frustration, often they are a rehearsed demonstration designed to frighten the opposing team into making a concession. Such temper tantrums indicate to the opponent that unless the desired concession is made, management will have to suffer with a hostile team at the bargaining table. There are various ways to handle such antics at the bargaining table, and they are discussed elsewhere in this book.

i. Espionage. Negotiations routinely require that the negotiator not reveal certain information to the opponent. For example, no competent negotiator would announce at the outset of negotiations the maximum salary that will be agreed to. The fact is reserved for a final offer which hopefully wraps up an entire labor contract.

Although there are proper and ethical ways to obtain such information through the bargaining process, there are cases on

record where the parties have engaged in outright espionage. Here are some points to consider in protecting the confidentiality of negotiations:

(1) All negoations notes and documents of all team members should be kept under security. This means, among other things, that negotiations notes should not be left in the negotiations room, nor should vital notes be discarded in the trash, where they might be picked up by members of the opposing team.

(2) Telephone conversations regarding negotiations should be carefully guarded.

(3) Only designated persons (the chief spokesman, the chief executive, the governing body, etc.) should know the final settlement point on each issue.

(4) All persons having contact with management's position on matters under negotiations, including secretaries, should be admonished not to discuss anything regarding negotiations with other staff members.

Despite good efforts, however, "leaks" in confidentiality do occur. When there is evidence of such breaches, every effort should be made to identify the source, and in the meantime, the circle of confidantes should be narrowed. Most branches in confidentiality occur in one of three places--the governing body, the chief executive, or a member of the negotiating team. In most cases, such breaks are unintentional, but in some cases they are intentional. Usually, the negotiating team can be controlled, and if there is a disloyal member, that person can

usually be identified through certain measures. Seldom is the chief executive involved in releasing confidential information, but it has been known to happen.

Surprisingly, most intentional breaches of confidentiality originate within the governing body. Usually, the motive for such unethical actions seems to be political in nature. In such cases the member of the governing body releases confidential information to the union in order to curry favor with the union, and thus gain the votes of the public employees through union endorsements.

When there is a leak on the governing body, there are several ways to finesse it:

(1) Get all instructions from the governing body by individual communication.

(2) Have all negotiations communications go to a committee of the governing body.

(3) Have the governing body authorize the chief executive to give overall directions to negotiations.

(4) Have the governing body give very broad guidelines to the chief negotiator.

k. Consortium Bargaining. Beginning around 1970, the Michigan Education Association, the state's organization of public school teachers, helped several local school districts to join together into one coordinated bargaining coalition. Although each local school district still bargained separately, the local teacher associations in those districts met regularly together to play overall negotiations strategies. Since then,

this approach to bargaining by public sector unions has spread to other areas.

Under the Michigan approach, locals within a county elect representatives to a Multi-Area Bargaining Organization (MABO), which then becomes the exclusive bargaining agent for all locals. By 1981, there were at least thirty-three MABOs in Michigan.

In response to consortium bargaining by unions, a number of governmental agencies, particularly school boards, have joined together on an informal basis to share their experiences and establish certain informal "guidelines" for negotiations. The author has been involved in the establishment of several such organizations (in two cases on a state-wide basis), and has found them to be extremely effective.

l. Media Events. One of the many techniques employed by organized public employees to strengthen their position at the bargaining table is to get the public's attention through use of the media, using both paid announcements and press releases. This technique should be neutralized, if possible, by prior agreement that no press releases will be made during negotiations, except by mutual agreement. If that is not possible, then each use of the media by the union must be evaluated on its individual merits and responded to accordingly.

m. Other Pressure Tactics. Remember, all pressure tactics are designed to cause the opposing team to take action (or to stop taking action) which it would not take if not for the pressure tactics. This is an important rule to remember, because if you can stand the pressure, no concession need be made. Also,

keep in mind that employees have more to gain under peace than under warfare. In other words, there is a limit beyond which union militancy becomes unproductive.

Some of the other pressure tactics employed by unions are:

(1) Hot lines. "Hot lines" are special telephone numbers established by the union in order to receive communications from employees and the citizens who may have information to communicate to the union.

(2) Demonstrations and mass meetings. Mass gatherings of employees are a step in the planned escalation of tensions. Mass gatherings of employees conjure up in the minds of management the nightmare of hoardes of crazed employees descending upon supervisors. Such meetings provide good press for the media, but usually have limited impact in the long run. Such meetings are also designed to unite the forces, but sometimes serve to divide the rank and file.

(3) Artificial deadlines. Unions will occasionally try to impose some deadline by which management must take certain action, "or else." The "or else" is usually a threat to have a mass meeting, or a threat to take a vote to censure management, or some similar threat. Such deadlines are usually artificial, and are one more step in the escalation of tensions.

5. Organize a good negotiating team

Labor negotiations require coordinated team effort. Naturally, the chief spokesman is a critical factor in the outcome of negotiations. However, the spokesman's effectiveness can be improved materially by

the support of a properly selected and organized team. Some of the considerations in organizing a good team are:

a. Each team member should be committed and loyal to the cause of his or her organization. Whether management or union, all members must believe in the value of their contribution to the process of negotiations. Neither management nor labor can tolerate a team member who cannot be trusted to reflect the best interests of the group the member represents. This is not to suggest that either party should choose extremists. Hotheads and radicals on either side only serve to drive the parties apart.

b. Each team should have some expertise to offer. On the management side there is usually a need for an expert in financial matters, an expert in personnel, and a good administrative generalist. On the union side there are similar needs. Each member, regardless of his field of expertise, however, should expect to be called upon to perform research on any matter which may be the subject of negotiations.

c. The effectiveness of the collective bargaining process can be influenced by the knowledge and skills of the participants. Therefore, each team member should be provided appropriate training. Such training should include not only practicum experiences under the tutelage of competent instructors, but in-depth reading on matters pertinent to the process of labor negotiations.

d. In addition to each team member being selected on the basis of expertise in a given area, each team member should be assigned a role as a functionary of the team, as noted below.

(1) Recorder. For example, each team needs someone to keep the official record for the team. The recorder should be responsible for an accurate summary of what transpired in negotiations, as well as an exact recording of tentative agreement.

(2) Observer. One person on the team should serve as an observer and listener. The process of negotiations requires that each party listen carefully to what the other party is saying. Observation of the actions on the other side of the table is also important. Since both the chief spokesman and recorder are frequently distracted by their own duties, it is important that someone else on the team be free to devote full attention to matters which might otherwise go unnoticed.

(3) Researcher. Each bargaining team should have a researcher. No matter how much advance preparation is made for negotiations, new questions and problems arise during the process of negotiations. The positions of the parties change constantly. Therefore, someone must be responsible for collection of data and information for the next meeting. This is not to suggest that there can be only one researcher. It might be necessary to have several. Which leads to the next consideration--that of team size.

e. Generally speaking, labor negotiations require at least three team members and no more than five members. As described above, at least three members are needed just to get the basic job done.

When more than five are used *at the table*, discipline becomes more difficult. Some members become bored and team spirit can be harmed.

f. Members of the governing body generally should not serve on the negotiations team. In other words, the persons who actually have the authority to consummate a final agreement should not participate in the negotiating process. Each party can strengthen its position by delegating negotiations to a team. Under such an arrangement, the team is given guidelines and limits on its authority.

This concept of delegation is more applicable to management than to the union. In most instances of public sector collective bargaining, an impasse in contract negotiations is finally submitted to the governing body; that is, the school board or city council, for example. Normally, this is done via the recommendations of a fact-finding panel, which conducts a hearing between the negotiating parties and then makes an advisory report to the two parties. If there is no agreement as a result of the recommendations to the panel, the governing body normally renders the final decision on what shall be the compensation, benefits, and working conditions of employees.

Under this procedure, it is very important that the governing body of the governmental jurisdiction refrain from putting itself in an adversary position. If it is to protect its sovereign and impartial nature, the governing body should not be involved directly in the negotiation process. Employees cannot be expected to view a city council member as impartial one day and

legislator the next day. Once a member of the governing body has participated in negotiations on behalf of management, there is likelihood that the member has harmed his or her ability to act in an impartial manner.

There are instances when it may not be practical to adhere to this admonition, however. In some very small jurisdictions, it is impossible for management to assemble a negotiating team without calling upon at least one member of the governing body. In such cases, it should be made clear that the member is serving as a *committee member of the negotiating team* and not as a *member of the governing body*. Although such a distinction may appear to be difficult, it is a distinction which must be made clear to both parties.

## Select a Good Negotiator

The effectiveness of labor negotiations is largely determined by the quality of the chief spokesman. Therefore, only fully-qualified persons should be selected. Although most unions and large governmental bodies have available excellent negotiators on their staffs, the use of outside independent professional negotiators should be considered seriously by those who do not have such a professional on the staff.

Some unions and many governmental agencies are too small to employ a full-time labor relations specialist. In such situations, an outside specialist should be retained part time on a consulting basis just to handle negotiations and provide needed consultation. Such an arrangement avoids the inevitable and costly overhead which accompanies employment of each new staff member.

Regardless of the size of the union or the governmental agency, however, an independent professional negotiator should be considered for a number of reasons:

a. Although large unions usually have a cadre of negotiators, the same is not true of the typical municipality or school district. The typical county, municipality, or school district simply does not have the staff to develop an expertise in collective bargaining. Experience is a critical factor in making a good negotiator. A professional labor negotiator may negotiate ten or more contracts a year. Even in a government agency which has a full-time negotiator, it might take ten years to accumulate the experience an independent negotiator acquires in one year.

b. An outside professional negotiator can be highly objective regarding negotiations issues. An employee who serves as a union spokesman or an administrator who serves as a management spokesman is often exposed to pressures that a professional negotiator is not subject to. For example, the effectiveness of some administrators is dependent upon good rapport with employees. Service as management's negotiator can be a real threat to that effectiveness. Similarly, the effectiveness of union negotiations can be harmed by using employees as spokesmen. Such spokesmen often lack objectivity and become emotionally involved in some of the issues under negotiations. Since professional negotiators can remain significantly detached from the negotiations process, they are highly resistant to intimidation. This is an important factor for both parties. Although neither party should be intimidated

by the other, each should be prepared to handle such tactics should they be used.

c. Complete and accurate information is a prerequisite to effective negotiations. Therefore, the chief spokesman must have immediate access to information relevant to subjects under negotiations. This clearly implies that employee spokesmen should come from the paid union staff or someone employed by a firm which specializes in labor relations. City councils and school boards, too, should seek a negotiator having access to needed information. Recently, however, particularly among school districts, management associations have been formed in order to develop an in-house store of useful data. In some cases, these associations are hiring spokesmen and consultants. Unions have followed this strategy for many years.

6. Know the bargaining law

Before entering into negotiations, both parties should be thoroughly familiar with the requirements of the applicable bargaining law. Specifically, the following issues should be studied in the bargaining law:

a. What constitutes proper bargaining units, and how are bargaining units determined? A bargaining unit is a group of employees who are covered by the same labor contract. In order to assure efficient negotiations, bargaining units must be carefully delineated. Although unions often prefer several bargaining units, e.g., one for secretaries, one for maintenance personnel, one for custodial personnel, etc., generally speaking management is better off with only a few broad bargaining units than

with many fractionalized units. Even though negotiations with a broad unit may encompass more comprehensive negotiations than with a single narrow unit, one broad unit ultimately requires less negotiations than would be the case if all covered employees were separated into several separate units. Additionally, a broad bargaining unit tends to force the union to make more negotiations compromises than would otherwise be with several separate units.

b. How is recognition and decertification handled? In labor relations under a bargaining law unorganized employees may unionize and petition for their union to be their exclusive representative for purposes of collective bargaining. When a majority of the employees in a given unit no longer support the bargaining agent, most bargaining laws provide a process to get rid of the agent through a process of decertification. Failure to be familiar with those parts of the law which deal with recognition and decertification can cause many serious problems for management.

c. What is the scope of bargaining? One of the major functions of labor negotiations is to provide a bilateral opportunity for both management and labor to decide the compensation and working conditions of employees. Therefore, the law should be examined carefully for any language which might expand the scope of bargaining beyond that of wages, benefits, and working conditions. Frequently, state bargaining laws (as well as the federal order governing bargaining in the federal service) contain statements apart from the section covering the scope of bargaining which

help interpret what the true scope of bargaining was meant to be. For example, an extensive definition of management rights in the bargaining law might reasonably be interpreted to be intended to narrow the scope of bargaining. In any case, however, all negotiators should be thoroughly familiar with what topics are mandatory topics, which topics are permissive, and which topics are prohibited. Otherwise, topics may be included in the labor contract which interferes with the efficient management of the agency.

d. What happens in the event of an impasse? With only a few exceptions, strikes are illegal in the public sector; therefore, there must be some alternative solution to negotiations which end in a stalemate. Whether or not the bargaining law provides a procedure to resolve a negotiations impasse, both parties should have a plan in the event of such an impasse. Naturally, the plan should provide for some final conclusion to negotiations. In most cases this means a final decision by the governing body.

e. What is the status of management personnel? An ideal bargaining law, from management's point of view, should deny all management personnel the right to organize for the purposes of collective bargaining. Furthermore, the definition of what employees are "managers" and "supervisors" should be broad and generally follow the definition of supervisors as contained in the National Labor Relations Act.

f. What constitutes an unfair labor practice? Some state laws define what is acceptable and unacceptable bargaining practices.

Such provisions are placed in the law to help assure that the collective bargaining process is carried out according to proper rules. If found guilty of an unfair labor practice, the offending party can be required by law to correct its actions, and in some cases, make amends. Although an employer should not be deterred from taking proper action at the bargaining table due to fear that a charge of unfair labor practice will be lodged, the employer should be aware of what are unfair practices and avoid them in the negotiations process.

g. What is the law regarding strikes by public employees? As stated earlier, strikes by public employees are generally illegal. However, no employer should automatically assume that a legal prohibition against strikes will necessarily stop them. Consequently, no employer should enter into labor negotiations with an employee union without a strike plan in reserve.

h. What are the "management rights" of the employer? All employers, whether public or private, must retain the right to manage. In all commercial and public service organizations somebody must make decisions in order to run the operation. The absence of the right (and obligation) to make decisions can result only in chaos. In almost all cases, the rights, powers, and duties of school boards, county boards, city mayors, state agencies, governors, and federal agencies are spelled out in the laws which brought these bodies into existence. The management negotiator should be familiar with these laws, particularly those sections which deal with the rights of the governing body to govern. Failure to protect the

fundamental right and obligation of government to govern results in the erosion of decision making, which in turn is harmful to efficient public service.

i. What provision is made in the state bargaining law for resolution of grievances? The definition of a "grievance" and the manner by which grievances are resolved are important issues in labor relations. Ideally, these matters should be left to be negotiated by the parties at the bargaining table. However, in some state laws, grievances and their methods of resolution are defined in the statute. In such cases, both negotiators should be fully aware of such provisions, since they affect greatly the nature of negotiations.

j. Does the bargaining law synchronize the bargaining cycle with the agency budget cycle? A number of state bargaining laws are written in such a way that the bargaining process is not coordinated with the budget cycle of the local government agency. For example, in a number of states, the local school board or governing body is still engaged in bargaining after a budget has been submitted for approval, and in some cases even after a budget has been adopted. Such lack of coordination usually creates unnecessary confusion between the parties. Ideally, negotiations should take place while the budget is under consideration, and negotiations should be completed prior to the final submission of the budget or the final adoption of the budget.

## IX. AFTER NEGOTIATIONS BEGIN

Once negotiations begin, there are a number of rules which should be followed. Although the book Bargaining Tactics contains over 300 suggested bargaining tactics, from those 300 tactics the author has selected ten which he considers to be of overriding importance. The ten imperative rules are:

A. Have an overall negotiations plan

B. Develop ground rules

C. Identify critical issues

D. Control the emotional tone

E. Use Quid Pro Quo

F. Avoid rapid negotiations

G. Understand the issue

H. Keep negotiations confidential

I. Do not threaten

J. Prepare language carefully

### A. Have an Overall Negotiations Plan

If the objectives of the parties are to be achieved through negotiations, each party must have a strategy plan. Neither party should enter into negotiations without such a plan; otherwise, the effectiveness of negotiations will not be maximized. In establishing a negotiations plan, the following should be considered.

1. Identification of critical issues

Every set of labor negotiations has only a few overriding issues. In the public sector, the amount of money available for salary increases is often somewhat fixed. In many instances, the employer would give a salary increase even without the pressure of negotiations. Therefore, the employees frequently view other issues as more important than salary. For example, the social worker may consider case load to be the number one priority. The sanitation worker may consider route length a key issue. Whatever the job area may be, however, there are only certain key issues. A skilled negotiator will identify these issues and plan accordingly.

2. Identification of deadlines

In order to make negotiations effective, certain deadlines must be set. For example, if sufficient time is to be allotted for negotiations, the beginning date should be set far in advance. By the same token, the ending date for negotiations must be set early enough to assure that negotiations have a chance to influence the governing body before it makes final budget decisions which might affect salaries and compensable benefits.

3. The possibility of an impasse

In the public sector, where there is often no legal right to strike, negotiations impasses are common. Therefore, each party should accept the reality that a negotiations impasse is very likely. Consequently, each party should plan a contingency strategy in the event that an impasse is reached. The union will explore what tactics it will employ

to persuade management to change its position, and management would be well-advised to prepare contingency plans in the event of concerted action from the employees. In other words, management should have a strike plan.

4. Adequate information and data

In order to back up a given negotiations plan, each party must have complete and accurate data, pertaining not only to the negotiations issues, but to the legal rights of the parties with respect to the *process* of negotiations. Specifically, each party should be aware of what actions constitute unfair labor practices. In labor negotiations, the record is replete with either party taking a negotiations position which has not been substantiated by adequate research. If management expects to prevail in its refusal to bargain on an issue, then there must be a complete case built. If the union expects to make a strike effective, it must be prepared to deal with the legal complexities which inevitably arise.

5. Communications

Negotiations is one process of communications. If negotiations are to be effective, each party must consider its communications strategy. Management's team will need to communicate with the governing body. The union team will need to communicate with its members. Both parties will often vie for the support of the public. And, in some cases, both parties will try to bypass the exclusive spokesman and communicate directly with principals.

Negotiations is also a struggle to determine who shall control the loyalty of the workforce. The outcome of this struggle is dependent in large measure on the ability of the parties to communicate persuasively.

## B. Develop Ground Rules for Negotiations

To enhance the effectiveness of negotiations, the two negotiators should have certain understandings regarding how negotiations shall be conducted. Some of these understandings eventually will find their way into the labor contract. Some will remain verbal understandings. There will be some procedural matters upon which the parties will never agree.

While some procedural matters (determination of the bargaining unit, for example) are often provided for in the bargaining law, there are many issues (such as press releases) which the parties must resolve voluntarily between themselves. Before entering into negotiations, the following questions should be considered in the development of ground rules.

### 1. Who is in the bargaining unit?

This question should be resolved in order to assure that negotiations cover the right group of employees and to ensure that the rights of persons not in a given bargaining unit are protected. There are a number of reliable sources which may be consulted by those who wish further information concerning unit determination.

### 2. What organization shall represent the employees and how is it selected?

Not only should the composition of the bargaining unit be clearly defined, but both parties must be sure that the organization representing those employees in the bargaining unit is legitimate. Negotiators for both sides should familiarize themselves with the areas of how to conduct bargaining elections, certify and decertify agents, etc.

3. How will negotiations be opened?

Normally, negotiations should begin with a complete proposal from the union. This proposal should be typed in double space on 8½" x 11" paper with each line numbered. The double spacing allows for changes, while the numbers on the margin assist in locating language under discussion. Each page should be numbered. When such a proposal is presented, there should be some understanding as to when management will respond. Of course, management will need sufficient time to study the proposals, just as the union needs time to prepare its proposals.

4. What is the time frame for negotiations?

There must be enough time to reach an agreement. Therefore, there should be an agreement on when negotiations are to begin and a good date for their conclusion. Otherwise, time compression will do its work on both parties.

5. How shall the public be kept informed?

Negotiations frequently work best when authorized spokesmen exclusively meet together to carry on negotiations in private. Press releases can be made, but they should be released by mutual consent. If this is not the case, it is too easy for each party to say something publicly which offends the other, resulting in increased difficulty in negotiations.

Sometimes a union will release its proposals to the public. This normally is not a wise practice for either party. Frequently, the public does not understand that the union proposals are a starting point for bargaining and therefore can easily view the proposals as unreasonable,

thus damaging public support of the union. Also, public releases can harden the positions of the negotiating parties and make reaching an agreement more difficult than necessary. In states where "sunshine" or public bargaining laws are required, the parties must live with this additional hardship.

6. What information shall be exchanged?

In order to negotiate properly, both parties must have access to information from the other side. This need is more pronounced for the union, since it is the moving party. Both parties should be cooperative in fulfilling this need. However, each side has certain information which it has a right not to share, and this is a matter for each party to decide. Although the decision is usually more difficult for management, generally speaking, management should provide whatever information is public and available. Naturally, management is not required to undertake research for the union.

7. What happens if an impasse is reached?

The resolution of impasses is usually covered in some detail by the applicable bargaining law.

8. How is the final negotiated document made official?

In order to avoid any last-minute misunderstandings which might impair negotiations, there should be an agreement on the manner by which the proposed contract is adopted. Normally, the union presents the proposed agreement to its members first. Assuming ratification by the members, the document is then presented for approval and appropriate

action to the governing body of the governmental unit, for example, the school board.

These are only some of the questions which must be answered prior to entering into negotiations. Others will also arise as the parties expand the process of negotiations.

### C. Identify Critical Issues

Most labor negotiations, in the final analysis, boil down to a few critical issues. Some examples of such critical issues are:

1. Salaries
2. Job Security
3. Union Security
4. Binding Arbitration of Grievances
5. Work Loads
6. Compensable Benefits

Although many other subjects can become critical issues in negotiations, most impasses resolve around those listed above. Never *assume*, however, that you know what the critical issues are from the other person's point of view. The *real* critical issues are those left over at the end. They are the issues that neither party will concede easily.

The identification of critical issues can be a real advantage in negotiations. Such identification helps plan strategies. It can avoid labor strife and enhance the quid pro quo process.

If you know your own priority of issues, you can plan a strategy which will help assure that maximum benefits are achieved through the negotiations process. For example, if management knows that a good salary increase is the top priority item for the union, management can

use its salary offer as leverage to get its way on many other issues. If the union knows that management will try to avoid a strike at any cost, then the union should be able to extract many concessions based on this knowledge.

The identification of critical issues can, under proper conditions, help to avoid unnecessary labor strife. For example, a school board may not recognize the importance of class size to teachers. And since class size is not normally a mandatory topic of bargaining, the school board might simply refuse to discuss the matter or express any concern for the size of classes. This attitude is a mistake. Class size is an important issue to teachers, and a school board must give attention to that concern. This is not to say that the school board must negotiate the size of classes. It does mean, however, that a school board should, through various methods, show its concern for class size and give some indication that it is attempting to provide optimum numbers of students in each class. Failure to take such action can only result in unnecessary morale problems within faculty.

### D. Control the Emotional Tone of Negotiations

Throughout this book, specific suggestions have been made that are designed to enhance the negotiations process. One suggestion that cannot be overemphasized is that if negotiations are to proceed smoothly, there must be a wholesome emotional tone. If the parties are distracted by degenerative emotions such as anger and hostility, negotiations will continue under a heavy burden. Following are some simple suggestions to establish a productive emotional environment for negotiations.

a. Do not use profanity, except in extreme cases. Even then, the choice of words should be the mildest of profanities possible to express the needed emotion. As a matter of fact, all coarse language, including obscenities, lewd references, and similar language should be avoided. Too many persons are offended by such language, especially in a business setting such as the negotiations table. There is a myth that hard negotiations are accompanied by tough language. This is not the case, except in unusual settings.

b. Avoid the use of insults, either ad hominem or otherwise. The presence of scorn, insolence, and disrespect at the bargaining table has a deleterious impact on the reaching of agreements under which people must live together. Therefore, all forms of insults should be suppressed. If faced with intentional insults, they should not be tolerated without redress. If insults become intolerable, the meeting can be terminated.

c. Threats and similar forms of intimidation should not be inserted into negotiations. This matter will not be commented on further at this point, as it has been previously discussed.

d. Patience is an important trait for a negotiator. Labor negotiations requires time for the parties to fully express their feelings. Except in the most unusual situation, each party should accord the other ample time to be heard. This means that the listener must be prepared to listen actively, and communicate through physical gestures that what is being said is being heard. It is a great compliment to be listened to.

e. Keep personal conflicts out of negotiations. The more compatible two negotiations teams are, the better are the chances that negotiations will proceed smoothly. Unfortunately, compatibility is not always present. Occasionally there are prejudices and past experiences which bring unfriendly attitudes to the bargaining table. In selecting a team, the chief negotiator should investigate to determine if any of the team members might create a personality conflict with members of the other team.

f. Be soft spoken. Most people are alienated by shouting and loud noises, especially when accompanied by obvious strong emotional feelings. The best practice is to state one's position quietly, avoiding tones which might express hostility. When faced with a negotiator who shouts and becomes angry, the best response is to call for a caucus each time such behavior is exhibited. This procedure will allow for a cooling-off period, and should eventually indicate that such antics achieve little.

g. A sense of humor is vital to a wholesome emotional tone at the bargaining table, but the expression of humor must be timed properly; however, humor based upon personal ridicule, race, sex, and religion should be avoided. Nor should humor be carried to an excessive degree which might indicate a cavalier attitude toward the process. Otherwise, the parties should react in a normal manner, seeking as much pleasure as they can from their arduous responsibilities.

h. Do not interrupt. As stated, people like to be listened to, and people like to hear themselves talk; so it requires considerable

self-restraint to refrain from interrupting the adversary, particularly when that person is stating a position which is considered to be incorrect or offensive. The best procedure is to hear the speaker out, taking careful notes during the discourse, so appropriate response can be made later.

i. Appeal to the opponent's finer instincts. If a man is referred to constantly as a gentleman, he will act like a gentleman--a woman who is treated with respect will act in a likewise manner. If people are characterized as honest, they will be less likely to be dishonest. When the other negotiator does a particularly good job, a compliment should follow. A mistake should generally be ignored. One should bring out the most positive qualities in the opposing negotiator.

Negotiations is both competitive and cooperative. This concept may appear to be a contradiction, but it is not. Negotiations is a process whereby each negotiator attempts to get the best deal he can; but in order to do so, the negotiator must be attuned to the needs of the opponent. The result is that experienced and capable negotiators compete to see who can come up with an agreement which provides the maximum amount of mutual satisfaction.

This competitive process can involve strong emotions, and the temptation is great (especially to the uninitiated negotiator) to give expression (usually anger) to personal feelings. When a school board negotiator offers a $500 increase for teachers, only to be laughed at by the union spokesman, there is justifiable cause for anger.

Although incidents such as these will happen more often than is ideal, the best practice is to react to such provocations (intentional or otherwise) with equanimity. Certainly, an emotional response to hostile statements cannot make the situation grow any worse. And in the long run, patience will expedite negotiations more effectively than anger.

### Don't Let Hostilities Escalate

If negotiations are to be workable, the parties must feel free to speak candidly, even if this means causing tempers to rise. Within reason, the privacy of the bargaining table can tolerate rather rough action. There are times, however, when hostilities may escalate to a point where some countering action must be taken; for once real hostility settles between the parties, there can be little progress in negotiations. When this happens, there are a number of tactics to employ, among which are:

a. Call a caucus. A short caucus is often all that is needed to let a temporary rift correct itself.

b. In more serious cases, a recess may be advisable, giving the parties several days to rethink their positions.

c. In other cases, if the source of the acrimony is one problem, perhaps that problem can be referred to a special joint committee for handling in isolation so that progress can continue on other items.

d. Of course, a good compromise on a critical issue is the best way to defuse a tense situation. Naturally, any such compromise should not be made under intimidation, but should be made because it is acceptable and workable.

e. Sometimes the negotiators themselves should meet privately to discuss the problem. Often such private meetings reveal information which cannot be discussed openly in the presence of numerous team members.

Any serious escalation in hostilities should not be ignored. Generally, such a situation calls for a willingness to make special compromises. The extra effort, even though difficult, will normally pay off in the long run.

## E. Use Quid Pro Quo

The core of collective bargaining is the process of the union trading the labor of employees in return for benefits from management. The process of giving one thing in return for another is referred to as quid pro quo. Without such trading, there could be no bargaining. The actual process of using the quid pro quo technique is accomplished through "packaging," which is described later.

Normally, the trading process works this way. A union will make a number of proposals, such as:

1. Increased sick leave
2. Higher salaries
3. Better hospitalization
4. Binding arbitration of grievances
5. Past-practice clause
6. Et cetera

Management then responds in the tradition of quid pro quo by stating that salaries will be increased if the union drops its proposals for increased sick leave and better hospitalization insurance. Further,

management will grant the past-practice clause if the union will withdraw its request for binding arbitration of grievances.

This approach makes some sense to the union (in that the only question is how much present benefits are improved), but it makes less sense to management in that management gets no guarantee that there will be any increase in the quantity and/or quality of work performed by employees in exchange for increased benefits.

Naturally, inflation has complicated the trading of labor for benefits. If inflation could be set aside, management would have every right and obligation to expect more and better work for more and better benefits.

The collective bargaining process may deal with a large number of issues, ranging from an average low of 50 to an average high of over 100. Even one issue, sick leave, for example, may have sub-parts which must be dealt with individually. In many states passing their first collective bargaining law, the original presentation by the union contained over 300 proposals. To the inexperienced negotiator, such a formidable list of proposals would be impossible to handle properly.

One way to materially expedite the process of negotiations is to respond in "packages." This technique involves putting together items which bear some relationship. For instance, here is a short list of proposals presented by a union:

| | | |
|---|---|---|
| Agency Shop | Rest Periods | Life Insurance |
| Dues Deduction | Extra Holiday | Dental Insurance |
| Salary Increase | Hospitalization | Maternity Leave |
| Increased Sick Leave | Sick Leave Bank | Overtime Pay |

The first step in dealing with such a list is to arrange all items into two groups: those which have direct costs and those to which there is no direct cost attached. As a result, the union proposals now look like this:

Group I: Money Items

| | | |
|---|---|---|
| Salary Increase | Hospitalization | Life Insurance |
| Dental Insurance | Overtime Pay | |

Group II: Non-Money Items

| | | |
|---|---|---|
| Agency Shop | Rest Periods | Sick Leave Bank |
| Dues Deduction | Extra Holidays | Maternity Leave |
| Increased Sick Leave | | |

For purposes of this demonstration, the next step is to group items together which have some relationship, trying to have present in each group something that can be agreed to. Such a step might produce "packages" like this:

Package No. 1

Management will grant a salary increase, but only if the union withdraws its proposals regarding hospitalization, life insurance, and dental insurance.

Package No. 2

Management will grant time-and-a-half for all hours over 39 hours per week, but the union must withdraw its proposal for rest periods.

Package No. 3

Management will grant a dues checkoff, but the union must withdraw its proposal for agency shop.

Package No. 4

Management will grant Friday as a paid holiday if Christmas Eve falls on either a Saturday or Sunday. Management will also grant parental (maternity) leave, but in return for these two concessions, the union must drop its proposals for improved sick leave.

The advantages of "package" bargaining are several:

1. It permits some concessions to be mixed with some rejections.

2. It follows the spirit of *bargaining*, in that the process of quid pro quo is used.

3. It protects one's position in the event of an impasse where a factfinding mediation process is used. This will be discussed in greater detail later.

4. It is an orderly procedure for handling a large number of items.

Naturally, the responding party is not required to follow this procedure. Nor is the responding negotiator obligated to keep these "packages" intact, even if he practices "package" bargaining.

## F. Avoid Rapid Negotiations

Some professional negotiators may pride themselves on being able to reach an agreement quickly. This may be acceptable under some conditions, but in most situations, rapid negotiations is a bad practice for a number of reasons.

a. Even in the hands of the most effective negotiators, negotiations require time. Each party, especially the union, should feel that it has worked for the concessions that it has won. So even though one party may be willing to settle a number of

issues at the first negotiating meeting, it is wise to let the other party work for the concessions.

b. Rapid concessions can give the impression to the principals that the process is simple or that it requires little serious attention. Neither is true. Labor negotiations are complex, and the process deserves the highest priority.

c. Rapid negotiations inevitably result in mistakes. Such mistakes can benefit one party, true, but at the expense of the other. In negotiations, it is not a good idea to profit at the expense of the other negotiator. Sooner or later, revenge will be sought. Therefore, a strong negotiator may at times actually help a weaker adversary avoid a mistake which, in the long run, will not benefit anyone.

Negotiations require careful actions; therefore, each action should be provided ample preparation time. But since negotiations are carried on under the watchful eye of an adversary, it is often necessary to employ tactics which gain time to prepare proper responses. Sometimes it is possible to gain adequate time at the table, while on other occasions, it is necessary to create time for contemplation away from the bargaining table.

When a little extra time is needed at the bargaining table, some of these tactics can be used:

a. Ask a question which requires considerable time to answer. For example, the following question usually works in eliciting an extended response: "I'm not sure I understand your problem. Would you please explain in detail what the problem is?"

b. Introduce a "smokescreen" of your own. This is best done by entering into a protracted soliloquy on an issue, allowing opportunity for only limited interruption.

c. There are many justifiable instances where it is appropriate to table an item for consideration later in the session. There are also times when it is necessary to gain time away from the bargaining table in order to prepare a response to an item. In such instances, the following tactics can be used:

(1) A caucus can be called of sufficient duration to accomplish the needed study of an issue.

(2) The item can be put on the agenda of a subsequent meeting.

(3) The item can be tabled indefinitely, ignoring the issue until a response is demanded.

Unless a proposal (or counterproposal) is totally acceptable, and there is a tactical reason for immediate acceptance, it is usually best to delay acceptance until a later time. In other words, sleep on it! This advice should be taken literally. A good night's sleep can do wonders to evaluate a negotiations proposal more objectively and critically.

The bargaining table creates a number of pressures which interfere with one's best thinking. The best way to avoid a concession which should not be made is to delay final acceptance until after the matter can be considered among the security of one's compatriots. Countless bad agreements have been entered into simply because one of the negotiators would not provide himself needed time for careful reflection.

There are tremendous pressures at the bargaining table to make concessions, and the temptation to bypass additional consideration should be strenuously resisted.

This advice is particularly applicable in the final stages of negotiations, for it is in the final stages of negotiations that all of the most important issues to both parties emerge. During the final stages of negotiations, not only are the important issues on the table, but the parties are usually at their weakest state to enter into agreements which, when implemented, will work for both parties.

So, unless there is some compelling reason to enter into a marathon session, there should be no final acceptances until the issues have been reflected on for at least 24 hours.

G. **Understand the issue**

Identifying a problem is often half of the solution to that problem. However, there are three major obstacles to identifying problems. First, the negotiator presenting the problem sometimes does not have a full understanding of what the problem involves. Second, even if the presentor understands the problem, he often has difficulty explaining it. Third, the listener, for various reasons, does not receive the message clearly.

In order to overcome the above obstacles to problem identification, the following procedure should be followed:

a. The speaker presenting the problem should be absolutely sure that he *thoroughly understands* the problem which the proposal is designed to correct.

b. The problem must be explained in simple language and rephrased several times, couched in different terms of explanation.

c. The listener should be encouraged to repeat the problem in his own language.

d. The person who presented the problem should question the listener to be sure that he has grasped the problem.

Once there is agreement on exactly what the problem is, the parties are well on their way to a solution. One reason for this prediction is that the original problem, when subjected to the above procedure, often becomes a problem of no significance or limited significance.

A broad and demanding proposal from the union that management guarantees safe and healthful working conditions may, under close questioning, be no more than a complaint that wet floors exist in a given work area. If such a problem exists, it should be corrected, making long and drawn out negotiations on a safety clause unnecessary.

The process of negotiations requires that each party makes a good faith effort to satisfy the other party. This means that original proposals change; and as they change, new problems arise, requiring additional research. The new counter-proposal should not be responded to until full research has been undertaken. For example, an original proposal by the union for increased sick leave might, during the course of negotiations, change to a proposal for a sick leave bank. The two proposals present an entirely different set of problems, each requiring separate research. Neither proposal, however, should be negotiated until the negotiator understands fully all ramifications of the proposal.

This advice is of particular importance to negotiators who are negotiating in subject areas outside of their sphere of technical

knowledge; as an example, the negotiator who normally represents firemen, but who, for some reason is representing hospital workers for the first time. When a negotiator is working outside of his own field of expertise, it is imperative to carefully analyze each proposal.

H. Protect confidentiality of negotiations

In order for collective bargaining to take place effectively, the process must be carried on in an atmosphere of confidentiality. Failure to recognize and adhere to this basic concept will surely erode one's bargaining positi and create unnecessary confusion.

Inherent to creating an atmosphere of confidentiality, each party must approach the bargaining table with the knowledge that in all negotiations there must be room for compromise. Therefore, the parties usually begin the negotiations by taking positions which would be ideal, and then, through the negotiations process, each makes concessions and falls back to less than ideal positions. By way of simple explanation, let's assume that a custodians' union requests at the outset of negotions that custodians in public buildings have their hourly wage increased by 10 percent. Naturally, the union would like to have a 10 percent increase, but would be surprised if its request was granted. In fact, the union would actually settle for a 5 percent increase, but obviously this fact is kept as private as possible; if management knew this, then management would have a significant advantage at the bargaining table. Similarly, the governing board of the governmental agency might make an initial counter offer that salaries be raised by 2 percent, when in reality, management would be happy to get an agreement at 4 percent.

Understandably, the governing body does not want anyone else to know its position for the same reason that the union wants its final fall-back position kept private. Given the example stated above, the parties should have little difficulty, through good faith negotiations, in reaching an agreement on salaries. Naturally, most labor bargaining is not this simple. Nevertheless, the principle demonstrated here is applicable to practically all proposals.

Unfortunately for negotiations, privacy in the public sector is more of a problem than in the private sector. Not only do public agencies work in an atmosphere of the public's "right to know," but a growing number of states are enacting "sunshine" laws, in which practically no governmental business (including negotiations in some states) can be conducted in executive session. Confidentiality of public sector labor negotiations is also made difficult by the political obligations of public officials, who frequently feel they have political advantage to gain by revealing negotiations positions to either the employee union, the press, or members of the public-at-large.

Such antics are a real frustration to the professional negotiator, whose strategy is often dependent upon confidentiality of final positions on issues under negotiations. The union negotiator faces the same problem when a member of the union team, in an effort to gain personal advantage, reveals to members of management information which should be kept private.

In order to achieve an optimum level of confidentiality in negotiations, the following points should be considered:

a. There should be only one official spokesperson for each party. Only this person should be authorized to make proposals and

counter-proposals. All other persons should be admonished to refrain from involving themselves in negotiations. If they persist in doing so, their statements do not necessarily reflect the true position of their respective parties.

b. To the extent legally permissible, all granting of negotiations guidelines should be done in private. Furthermore, the negotiations process itself should take place in private, to the extent permitted by law.

c. When the governing body of the union or of the governmental agency provides guidelines and authority to its negotiator, such guidelines should not be put in writing, because such written documents have a way of coming to rest in the wrong hands. As a matter of routine, negotiations notes should be kept private. Even those being taken at the bargaining table should be taken in a manner so that the opposition has no view of positions being taken.

d. The chief negotiator should be tight-lipped with all persons other than his own principals and team members. This suggestion is discussed in greater detail in another section of this book.

Orderly negotiations require that both the organized employees and their employer be represented by an exclusive spokesperson. The public section being highly political, however, this concept is often violated. Specifically, it is not uncommon for unions to bypass a city council negotiator in order to deal directly with the individual members of the governing body. From the union point of view, this tactic is often quite effective. From the management point of view, such a practice can be devastating, in that such political dealings often result in settlements

based upon controversial political considerations, rather than what is proper from the standpoint of efficient government and what is best for the taxpayers who must foot the bill and live with the services of government.

The problem of politicians teaming up with public employee unions is quite pronounced in a number of cities; New York City being the prime example of how a city can destroy its financial integrity by mixing collective bargaining with politics. In order to assure that politicians do not work directly with employee unions, the San Francisco City Council passed a resolution that all communities with the city's employee unions must go through the city's labor relations director. This policy would be wise for unions to follow also, to avoid its own members bypassing the union leadership. Fortunately, a number of jurisdictions are learning this lesson and have passed similar resolutions and policies which appoint exclusive spokespersons on all matters related to negotiations.

I. Do not threaten

Threats have no place in good faith negotiations; nevertheless, threats sometimes must be dealt with as a tactic at the bargaining table. Threats at the bargaining table destroy good faith negotiations, which are based upon an honest effort on the part of each negotiator to find a common ground. Good faith is based upon the concept that each party will make its best effort to concede as much as it can in order to reach agreement.

Threats are appropriate only when the other party acts in obvious bad faith. For example, a local city council refuses to negotiate with

the spokesperson chosen by the union, and insists on bypassing that person to negotiate directly with individual employees and/or individual groups of employees. Given such a situation, the union would probably have good cause to threaten the city council--but what type of threat? Most states have provisions in their bargaining laws to prohibit actions such as bypassing the designated spokesperson; but suppose the city council was unaware of the provision, or did not interpret the provision in the same way it was by the union? Given these possibilities, what is the appropriate threat for the union to use? If this be the case, it seems that the only appropriate threat for the union to employ would be to threaten the city council with an unfair labor practice, which under most state laws is the method to be followed in such situations.

Threats at the bargaining table introduce an unwanted element into negotiations. Threats present power as an overt weapon in communications. This introduction of power causes the parties to move away from *reason* as the basis for settlement to *power* as the basis. Such settlement, however, seldom serves the interests of either party.

When faced with threats at the bargaining table, the best response is silence--at least until it becomes apparent that threats are being employed as a deliberate negotiations technique. In such case, the opposing negotiator should attempt to talk privately with the adversary and educate him as to the proper way to carry on productive negotiations. Should this fail, it may be necessary to explain to the protagonist, in the presence of both teams, that such techniques will only harm progress toward benefits and working conditions which are mutually agreeable and mutually beneficial.

In a way, a threat is a form of a negotiations concession, in that the threatener is saying, "I intend to hurt you. However, I will withdraw my intention to hurt you if you will do what I say. Such a convolution puts the onus on the other party, in that if they get hurt, it is their own fault. Labor negotiations take place in an atmosphere of threat because the union can inflict punishment by withholding labor, and management can punish by withholding benefits.

Although overt threats should be avoided in negotiations, there are instances when threats are warranted. In contemplating the use of threats, the following considerations should be noted:

a. The consequences of the failure to heed a threat might be so awesome as to cause immediate compromise by the party being threatened. The danger in such use of threats is that the threatener might be forced to take the threatened action. For example, a city council might threaten to fire every policeman who goes on strike. Frankly, however, the nature of the threat should be commensurate with the action it is designed to stop.

b. A threat is useless if the adversary does not believe the threat.

c. Threats are an expression of willingness to use raw power. Persons subjected to such threats have a tendency to find a way to "get back." Threats in labor negotiations are a short-run tactic, and do not generally work over an extended period of time.

Following are some useful suggestions for handling threats:

a. Convince the threatener that he will lose more than you will.

b. Give the impression that you do not realize that you are being threatened. This will give the threatener a face-saving opportunity to withdraw the threat.

c. Be irrational in your response. With great emotional expression, indicate that any consequence, no matter how extreme, will be endured rather than to capitulate.

d. Convince your adversary that the threatened action cannot hurt you. For example, a city council should respond to a threat of a strike by trash collectors by showing that the city is fully capable of collecting trash in other acceptable ways--maybe even at a lesser expense.

e. Take the intended action. The threatener is then forced to invoke the threat or find a way to retreat.

f. Protest to the public. The public can exert considerable pressure on the negotiating parties. The one which wins the favor of the "public" has increased chances of a win at the bargaining table.

Negotiations is a process whereby two or more parties discuss mutual concerns in order to arrive at an agreement to which they will adhere. An agreement entered into under duress is not an agreement which will last.

Ideally, labor negotiations should never result in a lockout or a strike, since both are acts of coercement. In the absence of legal constructions to the contrary, negotiations should go on until the parties find that combination of conditions under which they can live in mutual satisfaction and benefit.

An ultimatum destroys the spirit of cooperative effort whereby both parties try to understand the needs of the other, and thereby take steps toward reaching an accommodation. An ultimatum, by its very definition, is a final proposition, condition, or demand; one whose rejection will end negotiations and cause the parties to resort to force or other direct action.

Bear in mind, however, that an ultimatum in labor negotiations is not a rejection of a proposal. An ultimatum can be refusal to bargain or it can be a refusal to discuss an issue. Most frequently an ultimatum is a demand to accept certain conditions or negotiations will end. An ultimatum is an order to do something in negotiations "or else"! The "or else" usually signifies that other means will be sought to force a concession.

Although, ideally, negotiators should always continue until an agreement is reached, without either party giving a final offer, this type of relationship is often not the case. There is nothing wrong with either party reaching a final position on all issues, but the final position should be the result of sincere negotiations.

It is not an ultimatum to make concessions on a number of issues until no further movement can be made. Once one party has made several concessions on an item and announces that the limit has been reached, it is up to the other negotiator to decide to accept or reject. Hopefully, though, making final offers should be avoided.

From 1947 to 1969, the General Electric Corporation practiced a form of bargaining termed "Boulwarism," named after its originator, Lemuel R. Boulware, who was the Vice President in Charge in employee relations at GE. Following the Boulwarism approach, the management of

GE would undertake exhaustive research regarding what it considered to be a proper position on negotiations. The conclusions of such research left only limited room for concessions at the bargaining table. Naturally, the unions interpreted such an approach to bargaining to be an unfair labor practice, in that no real bargaining took place from the union's point of view.

Under examination by the National Labor Relations Board, Boulwarism was seriously questioned. The rationale of the NLRB seemed to be that a company should not state its final and most honest position at the outset of negotiations; but should play the game, making a threshold offer first, and gradually working up to (or down to) the final position. The net result of the NLRB ruling certainly can be interpreted to be a legal endorsement of the "game" of negotiations, even though the NLRB has no jurisdiction in the public sector.

### J. Prepare contract language carefully

The next to last act of negotiations (ratification is the final act) is writing down what has been agreed to; however, the act of writing down what is negotiated cannot be separated from the actual process of negotiations. While labor contracts are written to guarantee conditions *in the future*, most labor negotiations take place based upon *past* experiences. The past is known, but the future is unpredictable. This means that the negotiating parties can agree to something in good faith only to find that unforeseen events make the agreement very difficult to adhere to. Normally, this problem is not applicable to the union, since it is usually the union which is making the demands. It can, however, be a serious problem for management. So from management's point of view, special care must be taken to avoid agreeing to conditions

which cannot be delivered during the term of the contract. The following suggestions should be of help in writing the labor contract:

. Keep the agreement as short and concise as negotiations permit. All superfluous and irrelevant materials should be absent.

. All language should be precise. Say what you mean, unless there is some purpose served in ambiguity.

. Avoid inclusion of legal citations. Law is not negotiated between labor and management--law is legislated. Disputes arising over a labor contract are resolved by the grievance procedure. Disputes over law are resolved by the courts.

. Avoid statements of philosophy. Say exactly what is to be done and delete the extra verbiage.

. Avoid the incorporation of administrative forms and procedures in the agreement. These are metters which should be left to the discretion of management.

. Write you own counter-proposals. When your opponent's language is used in preparing a counter-proposal, there is a risk that the language will not say exactly what you mean.

. Prepare the final draft of the entire agreement yourself. This is not to suggest that the opponent is untrustworthy. This suggested procedure is simply a wise safety precaution.

. Avoid including in the labor contract documents which have not been negotiated. The only material which should be in the labor contract is the material which has been the result of specific negotiations.

. Before responding to a proposal, be sure to get it in writing; otherwise, there is a significant risk of misunderstanding.

. All tentative agreements should be written down in the agreed-to language.

. All tentative written agreements should be initialed by each negotiator and a copy kept by each.

. Purposeful ambiguity has a limited place in labor contracts. From the union point of view there may be some advantage to bind the employer to some broad obligation. From management's point of view, there may be some need to safeguard itself through the use of vague protective language.

. Use the primary meaning of words. Do not use an obscure definition of a word.

. Avoid verbal understandings and interpretations of written language.

. Avoid clauses which contradict another clause in the contract.

. Before a tentative clause is agreed to and initialed, have a reading session where each team member has a chance to study the language.

. Before the final contract is initialed, have a proofing session utilizing members of your team. This will help avoid incorporation of mistakes into the contract. It is not safe for the negotiator to proof his own work alone.

. Management should be careful not to agree to broad principles in the contract. Such principles invariably become the sources of grievances.

. Any confusion over the meaning of a tentative agreement should be clarified in writing before the clause is initialed.

. Labor contracts should be in lay language. Words should be used which are generally understood by the average lay person.

. Understand that the language of the labor contract is controlling. If there are no obvious mistakes in the contract, the language of the contract will be applied irrespective of any claims to the contrary.

. Verbal agreements are not binding if there is no proof of such an agreement.

. Unsubstantiated binding interpretations may not be attached to the contract by one party.

. What is agreed to is final. Failure to include a term is proof that it was intended to be omitted.

. When ambiguity is placed in an agreement and a dispute arises over that language, the dispute will be resolved against the author of the language.

. Anything placed in the agreement should be there for a *specific* reason. In expressly describing a particular act or law to which it shall apply, an irrefutable inference is drawn that what is omitted or not included was intended to be omitted and excluded.

## X. CONTRACT ADMINISTRATION

In the management of school districts and governments at the municipal, state, and federal levels, the function of labor relations is often viewed as a part of a total personnel administration program. In some instances, the labor relations function is referred to as employee relations. Regardless of the title, however, most government agencies carry on two functions simultaneously, one function dealing with the union and another dealing with employees separate from the union. Unfortunately, in some larger school districts and government agencies, the labor relations office and the personnel office do not always cooperate fully because of disputes over which office has authority over which function. Where such confusion exists, the superintendent or chief executive officer should undertake effective measures to correct the situation.

Basically, the labor relations function consists of contract negotiations, contract administration, grievance processing (a part of contract administration), and general union relationships. For those who want more advice on the process of negotiations, the two books by the author, Bargaining Tactics and Negotiations Strategies should be consulted.

### A. Understand the Role and the Nature of the Union in Contract Administration

In order to carry out effective labor relations, management must understand the function and nature of the employee organization as it

relates to the implementation of the labor contract. Keep in mind that in this regard, the labor relations process is a process between management's labor relations office and the union leadership, not the employees individually or collectively. In contract administration, the following points should be considered in working with the union:

1. Understand the role of the union

The union's primary role is to serve as the exclusive representative of a unit of employees for the purpose of negotiating a labor contract, administering the labor contract, and processing grievances arising from disputes over the application and interpretation of that contract. Although unions often assume other roles in the areas of lobbying and public affairs, the primary function of the labor union in America concerns the labor contract. Unlike their European counterparts, which are more inclined for the union to be an instrumentality of socialism, American unions seem more satisfied to deal with "bread and butter" issues. Failure to recognize the legitimate interests of the union inevitably will create serious labor problems. The chief executive who willfully undertakes a campaign to ignore or undermine the legitimate bargaining agent for employees is asking for unnecessary problems.

Since the union is the agent which consolidates the demands of employees and negotiates those demands, is it any wonder that the union expects to be closely involved in the administration of the union contract? Management must understand that when the majority of the employees choose freely an exclusive bargaining agent, the union automatically becomes the general spokesman for all employees on matters

related to their compensation, benefits, and working conditions. Consequently, when dealing with such employee affairs, management should always deal openly with the union.

2. Unions are political organizations

Uf a union is to survive, it must serve the interests of its members; i.e., the body politic of the union. In that respect, the union is a political organization, since its general direction is based upon the wishes of its members. Failure to serve these interests often results in decertification of the union.

The fact that the union is a political body has one overriding message for management, which is: management must be aware that the union always will serve as a rallying force for any action taken by management which is generally objected to by employees, or which provides the union with opportunity to make itself look good in the eyes of its members.

The author remembers clearly one such case where the agency business office made an error in issuing employee paychecks, by issuing checks for salary amounts slightly less than what the employees were entitled to. The error was discovered immediately by the business office, but unfortunately, the checks had been distributed to employees. The author called the union agent and told him of the error and assured him that the matter would be remedied immediately. The union agent stated that he was satisfied. However, despite that statement, he immediately called a meeting of local union representatives and told them *he* had discovered that management had short-changed employees and that *he*, the union leader, would see to it that the matter was corrected immediately. It

appeared in this case that even when management acted in good faith, the union could not overcome the temptation to seek political gain in order to ingratiate itself with the employees.

3. Deal honestly with the union

The worst mistake that a labor relations director can make is to get caught lying to the union on a matter which affects the welfare of employees and which provides political gain for the union. Few other mistakes will cause employees to rally to the union as quickly. Therefore, management should at the outset decide that it will always deal honestly with the union. This decision, however, does not mean that management must reveal all confidential information to the union. It does mean, though, that management should never lie to the union or make a statement which can be interpreted to be a lie.

The author will never forget an incident when he participated in a confidential *survey* of employee performance. When asked by the union head if a secret *evaluation* was being performed on employees, the author answered honestly in the negative. Unfortunately, the union representative had been given a copy of the survey by a disloyal manager. Consequently, the union agent embarked upon a campaign to prove that the author had lied to him. Although the grievance which was lodged was ruled on in favor of management by the arbitrator, in retrospect the author should have handled the matter in a manner which would have deprived the union of the opportunity to accuse management of lying.

4. **Union authority is only that granted in the contract and in law**

Although public employees may join a union if they wish and may empower the union to take certain actions, the union has no authority to require management to take any action unless such action is required by law or unless such action is agreed to by management. For example, the federal bargaining law and all state bargaining laws require that management negotiate with the agent chosen by a majority of the employees within a bargaining unit. Beyond that (with minor exceptions) the union has no other rights. Its only right is to bargain with management. Any other right or authority (pertaining to labor relations) must be gained by consent of the employer. This is an important concept, because it means that government agencies and school boards are free to manage their operations as they see fit, except where management agrees with the union to do otherwise.

Unfortunately, many uninformed supervisors seem to think that the union has powers which are not in the labor contract or granted by law. In consulting with government agencies and school districts, the author is constantly asked if the union has the right to carry out certain activities not spelled out in the labor contract. For example, in many school districts and government agencies, union officials routinely visit with employees while they are on the job. Often management is not aware of such visits, or neglects to object if it does know of such visitations. Such a practice, if allowed to continue unobjected to, becomes an established and approved practice and likely could not be stopped except through negotiations with the union.

This example is presented not necessarily to suggest that union officials should be prohibited from talking with employees on work time, but to indicate to the reader that a union has no rights except those agreed to by management or those granted by law. By recognizing this fundamental principle, management should be more able to retain its management rights and should be more able to exact concessions from the union as management concedes certain rights to the union.

5. Seek open communications with the union

Some school districts and other government agencies try to isolate the union by constructing a wall of silence. This is a mistake. Under skillful direction, management can gain more than the union can gain by open communications. Although management should keep the union informed of intended actions and developments of interest to the union, the labor relations director should *listen* more than he talks.

By being available to listen to the union, the labor relations director provides a safety valve for employee unrest. Furthermore, sympathetic listening often reveals much information about conditions among the workers (and managers) that otherwise might not be known to management. By listening carefully, management is apprised of legitimate employee problems and complaints and is enabled to resolve them before they become grievances or negotiations demands. In one government agency where the author served as employee relations director, the full-time union director was the single best source of information vital to heading off problems. This came about primarily because the author was willing to listen to the union head and to encourage him to discuss

problems and matters of mutual interest. The union leader seemed unaware that his willingness to talk revealed much information about the union which was helpful to the agency administration in keeping the upper hand.

6. Try to resolve problems informally

If all supervisors are well-trained and the agency has an "enlightened" personnel program, few troublesome demands should be brought to the bargaining table and few grievances should be lodged. By helping employees on a day-to-day basis and by cooperating with the union, management should be able to achieve higher productivity than would be the case under less "enlightened" circumstances. Naturally, such an approach to employee relations assumes that the government employer recognizes employees as valuable capital investments and assets, and that the union recognizes the advantage of cooperation with the employer. Although this assumption is falacious in some public sector operations, the goal of enlightened management is a goal which should be sought in all civil service and public education operations.

7. Alert the union to important actions to be taken by management

Because some government administrators resent the presence of a union and seem even frightened by the union in some cases, these government administrators are unable to establish profitable working relations with the union. Once a union is legitimately established, management has but one choice--*make the best of it*. True, labor-management relationships are not always ideal; nevertheless, it is possible in most situations to turn the union into a management asset. But before this can be done, the union must trust management. One way, among several ways, to achieve such trust is to inform the union first of important

activities intended for action by the administration. By following this rule religiously, the union will serve frequently as an aide to management rather than an impediment, in accomplishing its goals. Naturally, the union will not always agree with management on all intended actions, but at least the union is disarmed from making accusations of bad faith against management.

There are several advantages involved in alerting the union to important actions planned by management:

a. The union is not caught off guard by some abrupt development which may concern employees. When a union is surprised by some important management act, the first reaction of the union is to respond without adequate information. Usually, this response takes the form of some negative action.

b. Trust and credibility are developed between the two parties when management takes the union into confidence. This bond helps the parties work through peacefully their various problems.

c. Management is given an opportunity to discover what unanticipated problems might be associated with the intended action before the action is actually taken, thus allowing management time to modify the intended action in order to make necessary corrections.

8. Do not negotiate after closure

The labor contract should contain all of the items that the union and the employer have agreed to during negotiations. Once negotiations are over and the contract has been ratified by the union and approved by the governing body, there should be no further negotiations. Any demands that arise after closure should be held by the union until the

contract is reopened for renegotiations. Failure to follow this important and fundamental rule weakens management's power at the bargaining table and erodes the right to manage. Furthermore, unending negotiations create an atmosphere of unsettled conditions of employment which can damage employee morale and impede productivity.

9. Stay out of the union's internal affairs

Some Machiavellian government officials have tried to neutralize the union by attempting to manipulate and control the internal affairs of the union. This strategy usually backfires. When faced with a union which does not operate according to standards and methods agreeable to management, management should not attempt to subvert the union by planting informers, spreading anti-union rumors, harrassing union members, or generally engaging in other similar unsavory activities. Rather, management should deal openly and directly with the union in its complaints against the union. Attempts to infiltrate the union through various methods usually provides the union with a ready-made opportunity for confrontation, from which the union often emerges as a victor.

10. Don't let the union intimidate first-line supervisors

As stated earlier in this section, many supervisors seem to accord more rights to the union and infer more power to the union that exist in reality. In many cases, supervisors who work daily with rank and file employees and who have not been involved in negotiations seem susceptible to union pressure. It is not uncommon for some first-line supervisors to allow union activities on company time which are not provided for in the labor contract. Such permissiveness is a mistake, but can be

corrected by providing supervisors with instruction in the areas of employee supervision, contract administration, and grievance processing. By providing such an education program, much will be achieved in restricting the union to its proper role.

11. Don't get too close to the union

Some inexperienced and ill-informed labor relations directors seem to believe that management interests are served best by establishing a "good old buddy" relationship with the union leadership. This is a mistake. Eventually, such a close relationship will run into problems. Either the employer will begin to suspect its own negotiator or the employees will begin to feel they are being sold out by their negotiator. Therefore, the best approach to dealing with the union is to employ the "arms-length" approach. Under this approach, the union is dealt with on a regular basis, but always in a detached, businesslike manner.

## B. Managers Must be Trained in Contract Administration

The implementation of the labor contract should be a serious matter, because the contract is the basic document which determines the compensation, benefits, and working conditions of employees. Whether the contract contains a grievance arbitration clause, or whether the arbitration clause is binding or advisory, and willful failure to live up to the spirit of the contract will create a wall between management and the employees and provide the union with a cause to further attract the loyalty of the workforce.

There is generally no excuse for abuse of the labor contract by either party if both comprehend their respective roles. As far as

management is concerned, certain steps should be taken to prepare the administrative staff to implement and live with the contract.

1. What you do is more important than what you say

Some public employers seem to think they can deceive employees into believing that the employer is concerned with the best interests of employees by making speeches filled with cliches about the welfare of the workers. However, neither employees nor their union are so easily misled by such insincere actions. For the most part, the employer will be judged by what he does rather than by what he says. For example, the voluntary issuance of paychecks prior to the Christmas holiday will be more appreciated by the employees than all of the management good wishes for a Merry Christmas. Or, an early release of employees on the last workday before the Christmas holiday will mean more than all of those company Christmas "parties."

2. Identify management personnel

A very common problem is created in labor relations by confusion over who is management personnel. The primary cause of this problem is the use of "straw bosses"; that is, persons who "supervise" other employees on a daily basis, but whose management affiliation is unclear. Practically every public sector bargaining unit has such positions. For example, are head nurses in a public hospital supervisors, or are they rank and file employees? Although the head nurse is the person who most frequently gives direction to other nurses, the head nurse is not necessarily a "supervisor." The foreman or crew chief on a maintenance team may or may not be a manager, despite the fact that practically all

daily work direction may come from him. High ranking officers in both police departments and fire departments may actually be unit members, despite the fact that they may have functions in directing the workforce. Many large school districts have department heads in the secondary schools, as well as "coordinators" and "resource specialists," all of whom engage in giving some direction to other teachers.

In all of the cases cited above, these "straw bosses" may in some respects act like supervisors, when in fact they are most likely not members of the management workforce. In such instances, there is the risk that these persons will give some direction to other employees which is viewed by the employees as an official management direction, which in some way violates the labor contract. Should a grievance be lodged as the result of such direction, the grievance is then complicated by the issue of whether the direction given was authorized by management.

In order to minimize such problems, all employees, particularly management personnel, should have accurate job descriptions, and the actual work of the employee should be consistent with the official written job description. This job description, then, becomes the basis upon which a determination is made as to whether the employee is included in the bargaining unit or is a member of the management staff. The definition of what is a management position is usually contained in the bargaining law. This subject is discussed further elsewhere in this book.

### 3. All managers should be oriented to the labor contract

To assure that managers understand their role in contract administration, a number of steps should be taken:

a. All managers should be given a copy of the contract and be required to become familiar with its contents.

b. The definition of a grievance should be understood thoroughly, and each supervisor should understand that action should be taken in the event that a grievance should be lodged against him.

c. All deadlines in the contract should be noted and adhered to. For example, a deadline for performance evaluation must be noted and complied with; otherwise, there would exist the chance that a legitimate dismissal would fail due to a violation of requirement in the contract.

d. Key contract administrators should be given special seminars in labor relations, and they should undertake a program of self-study in labor relations by reading appropriate publications.

### C. Language Disputes are the Chief Cause of Grievances

Despite the good efforts of both negotiators, disputes over the meaning of certain contract language is inevitable. For example, here is an actual contract provision negotiated by two very competent negotiators. What does it mean?

> "An employee who does not work the day before the holiday or the day after shall not be entitled to holiday pay."

Careful reading of this language reveals a number of possible interpretations.

Here is another example from a reputable labor contract:

"An employee shall be paid time and one-half rate for hours worked over forty (40) hours in any work week, or for hours worked over eight (8) in any work day. The payment of said overtime shall be based upon the employee's base wage."

Confusion exists in the language above. For example, if an employee is sick one day or takes a vacation day during the work week, and is required to work the following Saturday, when Monday through Friday constitutes the work week, should that employee receive overtime? Management may well argue that it is not obliged to pay overtime because the employee did not actually work 40 hours. The union, on the other hand, may argue that the employee was paid while off work, and this is the same as having worked. Although the contract does not specifically state that sick leave and vacation shall be considered as time worked, neither does it state that this time shall be ignored when computing overtime. Both labor and management may have had their reasons for omitting a more specific provision for overtime from the contract. Such ambiguity frequently results in grievances being filed. In orienting supervisors to the labor contract, all language ambiguities should be noted and clarified.

## D. Note These Tips

Here are some suggestions to help avoid problems in contract administration.

### 1. Apply the contract uniformly to all unit members

If the contract is interpreted differently for different unit members, there is likely to be a grievance, and in such cases the arbitrator may

decide that the proper interpretation is the one which gives most benefits to the employees.

### 2. Try to resolve all contract problems informally

Without question, there will be differences of opinion between the union and management over the proper application and interpretation of the contract. In such cases, management should make every reasonable effort to resolve the matter informally. Otherwise, the union may "go public" with its complaint, or it may encourage a grievance. In either case, an informal solution is almost always preferable to management. Based upon over twenty-five years of dealing with employees and union complaints, the author can assure the reader that the longer such complaints go unresolved, the more complex they become, and the more likely is the chance that management will lose.

### 3. Keep dialogue open

As long as the union and the employer are in good faith discussion on contract problems, there is less chance that the union will seek other forms of redress less acceptable to management. It's only when the discussion stops or when an impasse has been reached in discussions that management can expect the union to undertake other remedies. When this happens, it is very likely that the problem will become worse and more difficult to resolve.

## E. Unless Negotiated Away, These Rights are Yours

As stated earlier, the only rights which the union has are those provided by law and those granted by the employer. As far as its relationships with the employer are concerned, the union has no other rights.

Therefore, unless given away by the governing agency, these rights continue to be possessed by the employer:

1. To direct the workforce

Except as prohibited by law or precluded by specific terms of the labor contract, the governing body and its staff should continue to take whatever reasonable actions are necessary to see to it that all employees perform their tasks in an acceptable manner.

2. To establish agency policy

Except in the areas of employee compensation, employee benefits, and employee "working conditions," the labor contract should not limit the government agency or school district from enacting any agency policies which are needed and appropriate. Naturally, the implementation of such policies may not unilaterally abrogate rights and benefits which employees have in the labor contract.

3. To hire, promote, demote, transfer, retain, suspend, and fire employees

The rights mentioned here are prerequisites to managing any operation, whether public or private; and unless the employer has given these powers away, the employer should continue to have unencumbered freedom in these areas, as long as its actions are exercised with a reasonable degree of good judgment.

4. Maintain efficiency of operations

A private employer must operate efficiently if it is to stay in business and survive competition. Similarly, the public employer must operate efficiently in the best interests of the public by statutory

obligation. Ideally, no labor contract should be allowed to interfere with this overriding obligation for efficient operation. For example, if a school board wishes to build larger schools in order to achieve greater efficiency, there should be no provision in the labor contract to prohibit such action.

5. Keep "reserved" rights

Unless an employer has agreed to a "maintenance of standards" clause or a "past-practice" clause, the employer should remain free to take any action not specifically prohibited by law or precluded by the labor contract. A good "zipper" clause and a "good management rights" clause can assist materially management in retaining its "reserved" rights. To operate effectively and efficiently, government must remain free to take all appropriate actions necessary for the public good. If the issue of past practices and management rights is left unresolved, then any action of the governing body (or its agents) which affects the "working conditions" of employees can be challenged by the union through the grievance procedure, or at the bargaining table, or at some public forum--none of which is to the best interest of the agency.

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